

Draft

DRAFT

General Scheme and Heads of Bill

ASSISTED DECISION-MAKING (CAPACITY) (AMENDMENT) BILL 2021

5 November 2021

TABLE OF CONTENTS

PART 1 - PRELIMINARY AND GENERAL

- Head 1 Short title and commencement
- Head 2 Interpretation

PART 2 - AMENDMENT OF ASSISTED DECISION-MAKING (CAPACITY) ACT 2015

- Head 3 Amendment of section 2 of Act of 2015
- Head 4 Amendment of section 8 of Act of 2015
- Head 5 Amendment of section 9 of Act of 2015
- Head 6 Amendment of section 10 of Act of 2015
- Head 7 Amendment of section 11 of Act of 2015
- Head 8 Amendment of section 13 of Act of 2015
- Head 9 Amendment of section 14 of Act of 2015
- Head 10 Amendment of section 15 of Act of 2015
- Head 11 New section 15A Offences in relation to decision-making assistance agreements
- Head 12 Amendment of section 16 of Act of 2015
- Head 13 Amendment of section 17 of Act of 2015
- Head 14 Amendment of section 20 of Act of 2015
- Head 15 Amendment of section 21 of Act of 2015
- Head 16 Amendment of section 24 of Act of 2015
- Head 17 Amendment of section 27 of Act of 2015
- Head 18 Amendment of section 28 of Act of 2015
- Head 19 Amendment of section 29 of Act of 2015
- Head 20 Amendment of section 30 of Act of 2015
- Head 21 Amendment of section 31 of Act of 2015
- Head 22 New section 31A Matters to be specified by Director in relation to co-decision-making agreements
- Head 23 Amendment of section 36 of Act of 2015
- Head 24 Amendment of section 40 of Act of 2015

Head 25	Amendment of section 42 of Act of 2015
Head 26	Amendment of section 43 of Act of 2015
Head 27	Amendment of section 44 of Act of 2015
Head 28	Amendment of section 45 of Act of 2015
Head 29	Amendment of section 46 of Act of 2015
Head 30	Amendment of section 47 of Act of 2015
Head 31	Amendment of section 50 of Act of 2015
Head 32	Amendment of section 54 of Act of 2015
Head 33	Amendment of section 55 of Act of 2015
Head 34	New Section 55A Review of declaration as respects capacity
Head 35	Deletion of section 57 of Act of 2015
Head 36	Amendment of section 58 of Act of 2015
Head 37	New Section 58A – Trust corporation
Head 38	Amendment of section 59 of Act of 2015
Head 39	Amendment of section 60 of Act of 2015
Head 40	Deletion of section 61 of Act of 2015
Head 41	Deletion of section 62 of Act of 2015
Head 42	Amendment of section 65 of Act of 2015
Head 43	Amendment of section 66 of Act of 2015
Head 44	Amendment of section 67 of Act of 2015
Head 45	Amendment of section 68 of Act of 2015
Head 46	Amendment of section 69 of Act of 2015
Head 47	Deletion of section 70 of Act of 2015
Head 48	Amendment of section 71 of Act of 2015
Head 49	Amendment of section 72 of Act of 2015
Head 50	Amendment of section 73 of Act of 2015
Head 51	Amendment of section 74 of Act of 2015
Head 52	Amendment of section 75 of Act of 2015
Head 53	Amendment of section 76 of Act of 2015
Head 54	Amendment of section 77 of Act of 2015

- Head 55 Amendment of section 78 of Act of 2015
- Head 56 New section 78A Notification to Director that a donor lacks capacity in relation to one or more decisions
- Head 57 Amendment of section 79 of Act of 2015
- Head 58 New section 79A Matters to be specified by Director in relation to enduring powers of attorney
- Head 59 Amendment of section 80 of Act of 2015
- Head 60 Amendment of section 82 of Act of 2015
- Head 61 Amendment of section 92 of Act of 2015
- Head 62 Amendment of section 95 of Act of 2015
- Head 63 Amendment of section 96 of Act of 2015
- Head 64 New Section 96A Circumstances in which an application may be made to court for a prohibition order
- Head 65 Amendment of section 98 of Act of 2015
- Head 66 Amendment of section 99 of Act of 2015
- Head 67 Amendment of section 100 of Act of 2015
- Head 68 Amendment of section 101 of Act of 2015
- Head 69 New section 101A – Digital signature
- Head 70 Amendment of section 102 of Act of 2015
- Head 71 Amendment of section 103 of Act of 2015
- Head 72 Amendment of section 139 of Act of 2015
- Head 73 New section 142A - Documents in electronic form and transmission of documents by electronic means
- Head 74 Amendment of section 143 of Act of 2015
- Head 75 Deletion of section 144 of Act of 2015
- Head 76 Amendment of section 145 of Act of 2015

PART 3 - AMENDMENT OF OTHER ENACTMENTS

- Head 77 Amendment of schedule to Freedom of Information Act 2014
- Head 78 Amendment of section 42 of Freedom of Information Act 2014
- Head 79 Amendment of section 7 of Juries Act 1976
- Head 80 Amendment of section 41 of Electoral Act 1992

- Head 81 Amendment of National Disability Authority Act 1999
- Head 82 Amendment of Equal Status Act 2000
- Head 83 Amendment of section 46 of Disability Act 2005
- Head 84 Amendment of section 47 of Disability Act 2005
- Head 85 Amendment of Human Rights and Equality Commission Act 2014
- Head 86 Amendment of Social Welfare Consolidation Act 2005
- Head 87 Amendment of Part 4 Nursing Homes Support Scheme Act 2009

PART 4 - MISCELLANEOUS

- Head 88 Review of Act of 2015

DRAFT

PART 1 - PRELIMINARY AND GENERAL

Head 1 Short title and commencement

Provide that:

(1) This Bill may be cited as the Assisted Decision-Making (Capacity) (Amendment) Bill 2021.

(2) The Act shall come into operation on such day or days as the Minister, following consultation with the Minister for Health, may appoint by order or orders either generally or with reference to any particular purpose or provision, and different days may be so appointed for different purposes and different provisions.

(3) Head 60 (*Amendment of section 82 of Act of 2015*) and Head 61 (*Amendment of section 92 of Act of 2015*) shall come into operation on such day or days as the Minister for Health, following consultation with the Minister, may appoint by order or orders either generally or with reference to any particular purpose or provision, and different days may be so appointed for different purposes and different provisions.

Explanatory Note:

Subheads (1) and (2) are standard provisions regarding the short title and commencement of the Bill.

Subhead (3) provides that the Minister for Health may, following consultation with the Minister for Children, Equality, Disability, Integration and Youth, commence the provisions in Heads 60 and Head 61 which relate to section 82 (*Definitions – Part 8*) and section 92 (*Persons who may make applications to relevant court under this Part, etc.*) of the Act of 2015. Heads 60 and 61 provide for amendments to Part 8 (*Advance Healthcare Directives*) of the Act of 2015 responsibility for which lies with the Minister for Health.

Head 60 proposes to delete the definition of “treatment” from section 82 of the Act of 2015 as the term is used outside of Part 8. Instead, the definition of “treatment” is proposed to be provided for in Head 3 (*Amendment of section 2 of Act of 2015*) which amends section 2 (*Interpretation - general*) of the Act of 2015.

Head 61 provides for an amendment to section 92 of the Act of 2015 to clarify that an attorney under the Powers of Attorney Act 1996 (No. 12) may make an application to the court under Part 8 of the Act of 2015 in relation to an advance healthcare directive without first seeking the approval of the court. An attorney appointed under an enduring power under the Act of 1996 is not included in the current list of people who may apply to court without first seeking the approval of the court and as such attorneys provide a similar service to a directive-maker as an attorney appointed under the Act of 2015 it is considered that they should be given equal treatment in that Act. A similar amendment is provided for in Head 23 (*Amendment of section 36 of Act of 2015*) in relation to section 36 (*Persons who may make applications to court under this Part, etc.*).

Head 2 Interpretation

Provide that:

In this Bill—

“Act of 2015” means the Assisted Decision-Making (Capacity) Act 2015;

“Minister” means the Minister for Children, Equality, Disability, Integration and Youth.

Explanatory Note:

This Head provides for the interpretation of certain terms used in the Bill.

DRAFT

PART 2 – AMENDMENT OF ASSISTED DECISION MAKING ACT 2015

Head 3 Amendment of section 2 of Act of 2015¹

Provide that:

Section 2 of the Act of 2015 is amended—

(a) in the definition of “intervener”, by the substitution of “(d), (da), (db), (dc) or (e)” for “(d) or (e)”,

(b) in the definition of “intervention”, by the substitution of the following for paragraph (d):

“(d) a special visitor or general visitor,

(da) a court friend,

(db) a person who falls within paragraph (b) of section 36(8) in respect of a relevant person,

(dc) a committee of the ward, or”,

(c) in the definition of “Minister”, by the substitution of the following for the definition of “Minister”:

“Minister” means the Minister for Children, Equality, Disability, Integration and Youth

(d) in the definition of “personal welfare”, by the insertion of the following after paragraph (f)

“(g) participation by the relevant person in healthcare research and social care research except in relation to clinical trials of medicinal products for human use or clinical investigations of medical devices;”,

(da) in the definition of “property and affairs”, by the insertion in paragraph (i) of “for the needs” before “of other persons”

(e) by the insertion of the following after the definition of “suitable”

¹ The drafting of the amendments to the 2015 Act in paragraphs (a), (b) and (d) and their introduction at Dáil Report Stage of the Disability (Miscellaneous Provisions) Bill 2016 were approved by the previous Government on 22 January 2019.

““treatment”, in relation to a person, means an intervention that is or may be done for a therapeutic, preventative, diagnostic, palliative or other purpose related to the physical or mental health of the person, and includes life sustaining treatment;”

Explanatory Note:

This Head provides for amendments to a number of definitions used in section 2 (*Interpretation – general*) of the Act of 2015.

The amendments proposed in respect of the definition of ‘*intervener*’ and ‘*intervention*’ provide that the guiding principles set out in section 8 (*Guiding Principles*) of the Act of 2015 will apply to court friends and also to an “other suitable person willing and able to assist the relevant person during the course of the hearing” as referred to in section 36(8)(b) (*Persons who may make applications to court under this Part, etc.*). In the Act of 2015 the people listed as interveners are as follows:

- (a) the court or High Court
- (b) a decision-making assistant, co-decision-maker, decision-making representative, attorney or designated healthcare representative
- (c) the Director
- (d) a special visitor or general visitor, or
- (e) a healthcare professional

Court friends, the “other suitable person”, and a committee of the ward are to be regarded as interveners carrying out interventions under the Act as they assist the relevant person in Court and it is proposed that they be included in the list of interveners and that they are subject to the guiding principles in section 8 of the Act of 2015. The ward’s committee has been included as a person who can make an application to court for a capacity declaration under section 54(1) and they are also included as a person who can assist the relevant person in court before a court friend is needed under the proposed new section 54(3B). (Head 32 provides for an amendment to section 54 (*Review of capacity of wards who are adults*) of the Act of 2015.) Head 71 also provides for an amendment to section 103 (*Codes of practice*) to include committees under the code of practice for court friends as they carry out a similar role for the relevant person.

The proposed amendment to the definition of “Minister” is to substitute the Minister for Children, Equality, Disability, Integration and Youth for the Minister for Justice and Equality.

The proposed amendment to the definition of ‘personal welfare’ is to clarify that participation in research, including healthcare and social care research, is a matter than can be included in a decision-making support arrangement under the Act. The inclusion of ‘research’ under subsection (g) provides for a relevant person to participate in health research and in social care research where they cannot give consent and where such preference is included in a decision support agreement. It is important that safeguards are in place so that the relevant person is not arbitrarily included in research. It is also important that the relevant person be provided with an opportunity to participate in research in line with his or her will and preferences. This provision has been included so

that people with capacity difficulties can benefit either directly or indirectly from participation in research (such as in relation to dementia). The Bill provides that the Minister shall make regulations to provide for consent and data protection in relation to research.

The issue of participation in clinical trials and clinical investigations is proposed to be excluded from this legislation as this is an area that is separately regulated under EU legislation as in, for example, the regulation of health research in the areas of clinical trials of new medicinal products or clinical investigations of new medical devices (such as, for example, a new type of pacemaker). The 2017 EU Regulation on Clinical Investigations of Medical Devices and the 2014 EU Regulation on Clinical Trials of Medicinal Products both allow for informed consent for participation in an investigation or trial to be given by a “legally designated representative” (as defined in each Regulation) on behalf of a person lacking capacity.

The amendment to the definition of ‘*property and affairs*’ is for the purposes of clarification. One of the matters included in the definition of “property and affairs” is:

- (i) providing, to the extent that the relevant person might have expected to do so, for the needs of a decision-making assistant, a co-decision-maker, an attorney, a designated healthcare representative or a decision-making representative for the relevant person or of other persons

This definition allows for provision to be made for the needs of a decision supporter or for the needs of other persons. However, as currently worded, the needs of other persons are not clearly stated and there is a risk that the provision might not allow for their needs to be encompassed. The intention is that the provision should clearly provide for the needs of other persons as well as the needs of decision supporters to be addressed. The amended definition is as follows:

- (i) providing, to the extent that the relevant person might have expected to do so, for the needs of a decision-making assistant, a co-decision-maker, an attorney, a designated healthcare representative or a decision-making representative for the relevant person or for the needs of other persons.

The definition of “treatment” is proposed to be moved from section 82 (*Definitions – Part 8*) to section 2 of the Act of 2015 as the term is now referred to in an amendment to Part 7 and therefore needs to be relevant to the entire Act and not only in Part 8. The policy intent is to exclude treatment decisions from EPAs and to provide for treatment decisions only in advance healthcare directives (AHDs).

Head 38 provides for an amendment to section 59 (*Enduring power of attorney – general*) to insert a new subsection (7) as follows:

“(7)(a) Where an enduring power of attorney confers authority in relation to personal welfare, the power does not authorise an attorney to consent to or refuse treatment.”

(b) To the extent that an enduring power of attorney includes a relevant decision specified in paragraph (a), the power shall be null and void.”.

This replaces section 62(5) and (6) (*Scope of Authority – personal welfare decisions*) which are proposed to be deleted in Head 41. The sections to be deleted are as follows:

“(5) A donor shall not, in an enduring power of attorney, include a relevant decision-

(a) relating to refusal of life-sustaining treatment, or

(b) which is the subject of an advanced healthcare directive made by him or her.

(6) To the extent that an enduring power of attorney includes a relevant decision specified in subsection (5), the power shall be null and void.”

DRAFT

Head 4 Amendment of section 8 of Act of 2015

Provide that:

Section 8 of the Act of 2015 is amended,

(a) in subsection (7)(d), by the substitution of the following for subparagraph (ii):

“(ii) a decision-making assistant, co-decision-maker, decision-making representative, attorney, court friend, a person who falls within paragraph (b) of section 36(8), a committee of the ward or attorney under the Act of 1996 for the relevant person, and

(iii) a designated healthcare representative for the relevant person, where the intervention relates to healthcare,”

Explanatory Note:

This Head provides for an amendment to section 8 (*Guiding Principles*) of the Act of 2015.

The purpose of the amendment is to include a court friend and an attorney appointed under an enduring power under the Powers of Attorney Act 1996 (No. 12) in the list of persons whose views are to be considered by an intervener when he or she is making an intervention in relation to a relevant person. The amendment also provides for the inclusion of a designated healthcare representative in the list of persons whose views are to be considered by an intervener when he or she is making a healthcare-related intervention in relation to a relevant person.

It is considered that a person who falls within paragraph (b) of section 36(8) and a committee of the ward should also be included as persons whose views are to be considered by an intervener before an intervention is made as these persons assist the relevant person in court in a similar manner to court friends.

The ward’s committee has been included as a person who can make an application to court for a capacity declaration under section 54(1) and they are also included as someone who can assist the relevant person in court before a court friend is needed under the proposed new section 54(3B). These amendments are provided for in Head 32 (*Amendment of section 54 of the Act of 2015*). Head 71 (*Amendment of section 103 of Act of 2015*) also provides for an amendment to include committees under the code of practice for court friends.

Head 5 Amendment of section 9 of Act of 2015

Provide that:

Section 9 of the Act of 2015 is amended—

(a) in the definition of “decision-making assistant”, by the insertion of “and specifications made by the Director under section 10(4A)” after “regulations made under section 10(4)”,

(b) in the definition of “decision-making assistant appointer”, by the insertion of “and specifications made by the Director under section 10(4A)” after “regulations made under section 10(4)”.

Explanatory Note:

This is a consequential amendment to section 9 (*Definitions – Part 3*) of the Act of 2015 arising from Head 6 which amends section 10 (*Decision-making assistance agreement*) and also provides for a new section 10(4A) to provide for specification by the Director of the Decision Support Service of the forms to be used in connection with decision-making assistance agreements, rather than requiring them to be prescribed by regulations made by the Minister. Providing for forms relating to the Act to be specified by the Director is considered to be consistent with the provisions of the Mental Health Act 2001 (No. 25) which requires forms relating to that Act to be specified by the Mental Health Commission.

Similar and related amendments are contained in:

- Head 6 amending section 10 (*Decision-making assistance agreement*)
- Head 12 amending section 16 (*Definitions - Part 4*)
- Head 13 amending section 17 (*Co-decision-making agreement*)
- Head 16 amending to section 24 (*Objections to registration*)
- Head 17 amending section 27 (*Reports by co-decision-maker*)
- Head 18 amending section 28 (*Variation of co-decision-making agreement*)
- Head 21 amending section 31 (*Regulations*)
- Head 22 inserting a new section 31A (*Matters to be specified by Director in relation to co-decision-making agreements*);
- Head 36 amending section 58 (*Interpretation - Part 7*)
- Head 38 amending section 59 (*Enduring power of attorney – general*)
- Head 50 amending section 73 (*Revocation and variation of enduring power*)
- Head 52 amending section 75 (*Reports by attorney*)
- Head 57 amending section 79 (*Regulations*) of the Act of 2015
- Head 58 inserting a new section 79A (*Matters to be specified by the Director in relation to enduring powers of attorney*).

Head 6 Amendment of section 10 of Act of 2015

Provide that:

Section 10 of the Act of 2015 is amended—

(a) in subsection (1), by the insertion of “and specifications made by the Director under subsection (4A)” after “regulations made under subsection (4)”,

(b) in subsection (2), by the insertion of “and specifications made by the Director under subsection (4A)” after “regulations made under subsection (4)”,

(c) by the substitution of the following for subsection (4):

“(4) The Minister shall make regulations as respects decision-making assistance agreements, including—

- (a) prescribing procedures and requirements relating to the execution, variation and revocation of a decision-making assistance agreement,
- (b) specifying the personal welfare or property and affairs, or both, which may be specified in a decision-making assistance agreement, and
- (c) the giving by the appointer of notice of the execution, variation or revocation of a decision-making assistance agreement—
 - (i) to the Director, and
 - (ii) to other specified persons, and whether or not by reference to persons who, under this Act, are required to be notified of an application made under this Act.

(4A) (1) The Director, having consulted with the Minister and, if so directed, in accordance with the terms of any direction made by the Minister, shall, in the performance of his or her functions under the provisions of this Act and the requirements of this Part, specify the following matters as respects decision-making assistance agreements:

- (a) the form of a decision-making assistance agreement;
- (b) the information to be included in or annexed to a decision-making assistance agreement for the purpose of ensuring that any document purporting to create a decision-making assistance agreement incorporates adequate information as to the effect of making or accepting the appointment;
- (c) the following statements for inclusion in a decision-making assistance agreement:

(i) a statement by the appointer, that he or she has read and understands the information as to the effect of making the appointment or that such information has been explained to the appointer, by a person other than the proposed decision-making assistant; and

(ii) a statement by the decision-making assistant, that he or she understands and undertakes to act in accordance with the functions of a decision-making assistant, including the duty to act in accordance with the guiding principles;

(d) the attestation of the signatures of the appointer and decision-making assistant by a person other than the appointer or the proposed decision-making assistant;

(e) the forms to be used in connection with the execution, variation and revocation of a decision-making assistance agreement;

(f) the form of notice to be given by the appointer of the execution, variation or revocation of a decision-making assistance agreement.

(2) The Director shall have regard to the following principles in the preparation of a form under subsection (1) –

(a) a form shall clearly set out the required information in concise and easily understood language and duplication of information shall be avoided in so far as practicable;

(b) a form shall be made available in accessible formats, including in an easy to read version;

(c) the implications (if any) of the proposed intervention for the rights of relevant persons, for potential interveners or for other interested parties, including family members, shall be identified and applicable Guiding Principles including the obligation to respect the relevant person's will and preferences, shall be set out; and

(d) relevant data protection provisions shall be included.”.

Explanatory Note:

This Head provides for the amendment of section 10 (*Decision-making assistance agreement*) of the Act of 2015.

The purpose of the proposed amendments to sections 10(1), 10(2) together with the substituted section 10(4) and the insertion of a new section 10(4A) is to enable the Director of the Decision Support Service to specify the forms to be used in connection with decision-making assistance agreements, rather than requiring them to be prescribed by regulations

made by the Minister. A discretionary direction-making power has been reserved for the Minister to ensure oversight but it is not intended to be exercised unless required.

Providing for forms relating to the Act to be specified by the Director is considered to be consistent with the provisions of the Mental Health Act 2001 (No. 25) which requires forms relating to that Act to be specified by the Mental Health Commission.

Similar and related amendments are contained in:

- Head 5 amending section 9 (*Definitions – Part 3*)
- Head 12 amending section 16 (*Definitions - Part 4*)
- Head 13 amending section 17 (*Co-decision-making agreement*)
- Head 16 amending to section 24 (*Objections to registration*)
- Head 17 amending section 27 (*Reports by co-decision-maker*)
- Head 18 amending section 28 (*Variation of co-decision-making agreement*)
- Head 21 amending section 31 (*Regulations*)
- Head 22 inserting a new section 31A (*Matters to be specified by Director in relation to co-decision-making agreements*);
- Head 36 amending section 58 (*Interpretation - Part 7*)
- Head 38 amending section 59 (*Enduring power of attorney – general*)
- Head 50 amending section 73 (*Revocation and variation of enduring power*)
- Head 52 amending section 75 (*Reports by attorney*)
- Head 57 amending section 79 (*Regulations*) of the Act of 2015
- Head 58 inserting a new section 79A (*Matters to be specified by the Director in relation to enduring powers of attorney*).

Head 7 Amendment of section 11 of Act of 2015²

Provide that:

Section 11 of the Act of 2015 is amended, in subsection (1), by the substitution of the following for paragraphs (a) and (b):

“(a) has been convicted of an offence in relation to the person or property of the person who intends to appoint him or her, or the person or property of a child of that person,

(b) has been the subject of a safety or barring order in relation to the person who intends to appoint him or her or a child of that person,”.

Explanatory Note:

This Head provides for an amendment to section 11 (*Persons who are not eligible to be decision-making assistants*) of the Act of 2015.

The amendment to section 11(1) provides for consistency in the Act to ensure that those excluded from undertaking other decision supporter roles are also excluded from becoming decision-making assistants. The aim is to ensure that a relevant person is protected from a decision-making assistant who might perpetrate coercive control or financial abuse of him or her, e.g. a person who has been the subject of a safety or barring order against a relevant person or that person’s child.

The Act of 2015 already provides that “persons who have been convicted of an offence in relation to the person or property of the child” of the appointer/relevant person/directive-maker, as the case may be, are not eligible to be a co-decision maker (section 18(1)(a) and (b)), decision-making representative (section 39(1)(a) and (b)), or designated healthcare representative (section 87(2) (b) and (c)).

A similar amendment in relation to attorneys is included in Head 42 which amends section 65 (*Persons who are not eligible to be attorneys*).

² The drafting of this amendment was approved by the previous Government for introduction at Dáil Report Stage of the lapsed Disability (Miscellaneous Provisions) Bill 2016.

Head 8 Amendment of section 13 of Act of 2015

Provide that:

Section 13(4)(h)(iii) of the Act of 2015 is amended

by the insertion of the words “entered into force in respect of himself or herself,” after “enduring power of attorney”

Explanatory Note:

This Head amends section 13 (*Disqualification as decision-making assistant*) of the Act of 2015 which lists the circumstances when a decision-making assistant shall be disqualified from being a decision-making assistant. One of these circumstances is where a decision-making assistant has an EPA in force due to his or her own lack of capacity. When this occurs he or she is disqualified from being a decision-making assistant. The reference to registration of an EPA is no longer appropriate as the proposed two-step process means that the EPA enters into force at the second stage when the Director is notified of the donor’s loss of capacity. (The current wording refers to the ‘registration’ of the EPA but under the proposed new procedure the EPA does not come into force until the second stage of the process when the donor loses capacity and EPA is, at that point, notified to the Director.)

This Head removes a reference to an Enduring Power of Attorney (EPA) completed under the 2015 Act being registered and inserts a reference to that type of EPA ‘entering into force’ in line with the proposed new procedure for giving effect to EPAs.

Under the Act of 2015 an EPA may be registered when a donor loses capacity. The new process requires that an EPA is to be registered at the stage of execution of the EPA while the donor has capacity and is in a position to discuss issues with the Decision Support Service (DSS). The second step in the proposed new process provides for the attorney to notify the DSS at the stage where the donor loses capacity and at that stage the EPA is entered into force.

The proposed introduction of a two-stage process will also require the amendment of a number of other sections of the Act of 2015 including

- Head 14 amending section 20 (*Nullity*)
- Head 24 amending section 40 (*Disqualification as decision-making representative*)
- Head 39 amending section 60 (*Content of instrument creating an enduring power of attorney*)
- Head 40 amending section 61 (*Notice of execution of an enduring power of attorney*)
- Head 43 amending section 66 (*Disqualification of attorney*)

- Head 44 amending section 67 (*Function of court prior to registration*)
- Head 45 amending section 68 (*Application for registration of instrument creating enduring power*)
- Head 46 to amend section 69 (*Registration of an instrument creating an enduring power of attorney*)
- Head 47 deleting section 70 (*Effect and proof of registration*)
- Head 48 amending section 71 (*Objections to registration*)
- Head 49 amending section 72 (*Register of Enduring Powers*)
- Head 50 amending section 73 (*Revocation and variation of enduring power*)
- Head 51 amending section 74 (*Disclaimer by attorney*)
- Head 52 amending section 75 (*Reports by attorney*)
- Head 54 amending section 77 (*Applications to court*)
- Head 56 inserting a new section 78A (*Notification to Director that donor lacks capacity in relation to one or more relevant decisions that are subject of enduring power of attorney*)
- Head 58 inserting a new section 79A (*Matters to be specified by the Director in relation to enduring powers of attorney*)
- Head 59 amending section 80 (*Offences in relation to enduring powers of attorney*) of the Act of 2015.

DRAFT

Head 9 Amendment of section 14 of Act of 2015 ³

Provide that:

Section 14 of the Act of 2015 is amended, in subsection (1)(b), by the substitution of “assist” for “advise”.

Explanatory Note:

This Head provides for an amendment to section 14 of the Act of 2015 to correct a reference in paragraph (b) of subsection (1). The function of a decision-making assistant is intended to “assist” rather than to “advise”. The risk is that, if the provision is not amended, a decision-making assistant might become overly engaged in relation to decision-making on behalf of a relevant person in a manner that not been originally intended in the Act of 2015. This support option is intended protect the rights of a relevant person to make his or her own decisions. It is a function of a co-decision-maker to advise and not that of a decision-making assistant. Section 19(1)(a) of the Act of 2015 provides that a co-decision-maker shall advise the appointer by explaining relevant information and considerations relating to a relevant decision and ascertain his or her will and preferences in regards to that decision.

³ The drafting of this amendment was approved by the previous Government for introduction at Dáil Report Stage of the lapsed Disability (Miscellaneous Provisions) Bill 2016.

Head 10 Amendment of section 15 of Act of 2015⁴

Provide that:

Section 15 of the Act of 2015 is amended,

(a) by substituting “decision-making assistance agreements” for “decision-making assistants” in the shoulder note,

(b) in subsection (1) –

(i) by the substitution of “one or more of” for “one or both of”, and

(ii) in paragraph (c), by the substitution of “decision-making assistance agreement or to vary or revoke the decision-making assistance agreement.” for “co-decision-making agreement”.

(c) in subsection (2) –

(i) by the substitution in paragraph (b) of “same, or” for “same.”

(ii) by the insertion of the following after paragraph (b)

“(c) where he or she is of the view that the complaint is well founded but that –

(i) mere clarification of the decision-making assistant role is a more appropriate resolution, or

(ii) the subject matter of the complaint is otherwise better addressed under section 96(4),

the Director may, within 21 days of having completed his or her investigation, and having obtained the written consent of the complainant and the person who is the subject of the complaint and the relevant person concerned or, where the written consent of the relevant person cannot be obtained, having determined it to be, to the greatest extent possible, the will and preference of the relevant person, decline to make an application to the court and address the complaint under (i) or (ii) above.

⁴Proposed amendment (b) above to section 15(1) of the Act of 2015 was brought forward at Committee Stage of the Disability (Miscellaneous Provisions) Bill on 30 January 2019.

(d) by the insertion of the following after subsection (2)

“(3) When carrying out an investigation under this section, the provisions of section 96(2), 96(4), 96(6), 96(7) and 96(8) shall apply.

(4) Where the Director fails to secure the consent of any person under subsection (2)(c), or where he or she reasonably believes it to be the will and preference of the relevant person concerned, he or she shall make an application to the court for a determination in relation to a matter specified in the complaint.”.

(5) A person who receives a notification under *subsection (2)(b)* may, not later than 21 days after the date of issue of the notification, appeal a decision of the Director that the complaint is not well founded to the court.

(6) The Director may, notwithstanding that no complaint has been received, on his or her own initiative carry out an investigation and make an application to the court for a determination in relation to any matter specified in *subsection (1)*.

(7) The court may—

- (a) pursuant to an application to it under *subsection (2)(a) or (4)*, or
- (b) pursuant to an appeal under subsection (5),

make a determination in relation to a matter specified in subsection (1) and may, if it considers it appropriate, determine that a decision-making assistant shall no longer act as such in relation to the appointer concerned.

(8) Complaints shall be made within 12 months of the incident or knowledge of the incident. The Director may admit late complaints at his or her discretion. A late complaint not accepted by the Director can be appealed to the Court not later than 21 days after the date of issue of the Directors decision.”.

Explanatory Note

This Head provides for the amendment of section 15 (*Complaints in relation to decision-making assistants*) of the Act of 2015.

It is proposed to amend the shoulder note to the section to more accurately reflect the content of its provisions. The current shoulder note refers only to decision-making assistants however other third parties could be involved in using coercion or undue pressure to induce the appointer to enter into, vary or revoke a decision-making agreement. The shoulder note should reference “decision-making assistance agreements” as complaints

may be made in relation to an agreement and not just in relation to the decision-making assistant.

The proposed amendment to section 15(1) is a technical amendment. As there are three paragraphs in section 15(1), the text 'one or both of' is to be replaced with 'one or more of' to reflect that there are three paragraphs in that subsection.

The first proposed amendment to section 15(1)(c) is a technical drafting amendment to replace the reference to co-decision-making agreements with a reference to decision-making assistance agreements. The second proposed amendment to section 15(1)(c) is to include as a ground for complaint that fraud, coercion or undue pressure was used to induce the appointer to vary or revoke a decision-making agreement. This is in addition to the ground for complaint that fraud, coercion or undue pressure was used to induce the appointer to enter into the decision-making agreement. Similar amendments have been proposed for consistency in section 30 (Head 20) in relation to co-decision-making agreements, section 47 (Head 30) in relation to decision-making representatives and in section 76 (Head 53) in relation to EPAs

The intention with the proposed insertion of a new subsection (2)(c) is to provide a means of resolving complaints outside of application to the courts. The consent of the parties concerned is sought so that the Director is not being called on to resolve the matters in subsection (1), which could be regarded as justiciable controversies and therefore the sole purview of the courts, but is instead seeking the consent of the parties involved to set aside a justiciable controversy in favour of a more appropriate method of resolution. This is intended to prevent an undesirable binary in the Act of 2015 where all complaints, regardless of nature, are forced into the courts system once a complaint is found to be well-founded, no matter how appropriate a method of resolution that may be. Seeking the consent of the parties for an alternate resolution allows more flexible methods of resolution such as, for example, in instances of innocent mistake or misunderstanding of a decision supporter's role.

The proposed new subsection (3) is intended to make sure that the suite of powers possessed by the Director in relation to investigations, specified in section 96, apply to investigations here.

The new subsection (4) provides that the Director shall apply to the court for determination of a matter specified in a complaint where the consent of the parties concerned cannot be obtained to set it aside. This course of action could be inferred from the consequences of the proposed subsection 2(c), but has been included in the General Scheme for the avoidance of doubt, and to make sure that complaints do not fall.

This Head also inserts a new subsection (8) to provide that complaints shall be made within 12 months of the incident or knowledge of the incident and that the Director may use his or her discretion to admit a late complaint.

Head 11 NEW SECTION 15A - Offence in relation to decision-making assistance agreement⁵

Provide that:

The Act of 2015 is amended by the insertion of the following new section after section 15:

“Offence in relation to decision-making assistance agreement

15A. (1) A person who uses fraud, coercion or undue influence to force another person to make, vary or revoke a decision-making assistance agreement commits an offence and shall be liable—

(a) on summary conviction, to a class A fine or imprisonment for a term not exceeding 12 months, or both, or

(b) on conviction on indictment, to a fine not exceeding €50,000 or imprisonment for a term not exceeding 5 years, or both.

(2) The reference in subsection (1) to coercion or undue influence includes any case where a person’s access to, or continued stay in, a designated centre or mental health facility, is contingent (whether in whole or in part) on the person having to, or being led to believe that he or she has to, make, vary or revoke a decision-making assistance agreement.”.

Explanatory Note:

The purpose of this Head is to introduce an offence in relation to decision-making assistance agreements and provide for consistency in the Act regarding offences in relation to the various decision-support arrangements such as co-decision-making agreements (section 34), enduring powers of attorney (section 80) and advance healthcare directives (section 90), provided for in the Act. It provides for an offence where a person uses fraud, coercion or undue influence to force another person to make, vary or revoke a decision-making assistance agreement. A decision-making assistant may have access to sensitive information in relation to a relevant person when assisting that person to make decisions and there may be a risk that the decision-making assistant could use that information to exploit the relevant person and to influence decisions on assets. The introduction of an

⁵ The drafting of this amendment was approved by the previous Government for introduction at Dáil Report Stage of the lapsed Disability (Miscellaneous Provisions) Bill 2016.

offence for such actions is intended to act as a deterrent and to thereby safeguard the relevant person.

Consequential amendments are required in sections 11(1)(g), 13(4)(g), 18(1)(g), 20(6)(g), 39(1)(g), 40(4)(g), 65(1)(g), and 66(4)(g) in order to add section 15A to the list of offences in those sections (which currently reference sections 34, 80, 90 and 145). These sections prevent a person convicted of these offences under the 2015 Act from becoming or remaining a decision-making assistant, a co-decision maker, a decision-making representative or an attorney.

Being convicted of an offence under the 2015 Act does not prevent a person from becoming a designated healthcare representative.

DRAFT

Head 12 Amendment of section 16 of Act of 2015

Provide that:

Section 16 of the Act of 2015 is amended,

in the definition of “co-decision-maker”, by the substitution of “this Part, regulations made under section 31 and specifications made by the Director under section 31A” for “this Part and regulations made under section 31”.

Explanatory Note:

This Head provides for an amendment to section 16 (*Definitions - Part 4*) of the Act of 2015 and is related to and consequential to the proposed amendments to section 31 (*Regulations*) of the Act (Head 21) and the proposed new section 31A (*Matters to be specified by Director in relation to co-decision making agreements*) (Head 22) to provide for specification by the Director of the Decision Support Service of 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. Providing for forms relating to the Act to be specified by the Director is considered to be consistent with the provisions of the Mental Health Act 2001 (No. 25) which requires forms relating to that Act to be specified by the Mental Health Commission.

Similar and related amendments are contained in:

- Head 5 amending section 9 (*Definitions – Part 3*)
- Head 6 amending section 10 (*Decision-making assistance agreement*)
- Head 13 amending section 17 (*Co-decision-making agreement*)
- Head 16 amending to section 24 (*Objections to registration*)
- Head 17 amending section 27 (*Reports by co-decision-maker*)
- Head 18 amending section 28 (*Variation of co-decision-making agreement*)
- Head 21 amending section 31 (*Regulations*)
- Head 22 inserting a new section 31A (*Matters to be specified by Director in relation to co-decision-making agreements*);
- Head 36 amending section 58 (*Interpretation - Part 7*)
- Head 38 amending section 59 (*Enduring power of attorney – general*)
- Head 50 amending section 73 (*Revocation and variation of enduring power*)
- Head 52 amending section 75 (*Reports by attorney*)
- Head 57 amending section 79 (*Regulations*) of the Act of 2015
- Head 58 inserting a new section 79A (*Matters to be specified by the Director in relation to enduring powers of attorney*).

Head 13 Amendment of section 17 of Act of 2015

Provide that:

Section 17 of the Act of 2015 is amended—

(a) in subsection (1), by the substitution of “this Part, regulations made under section 31 and specifications made by the Director under section 31A” for “this Part and regulations made under section 31”,

(b) in subsection (3), by the substitution of “this section, regulations made under section 31 and specifications made by the Director under section 31A” for “this section and regulations made under section 31”.

Explanatory Note:

This Head provides for an amendment to section 17 (*Co-decision-making agreement*) of the Act of 2015 and is related to and consequential to the proposed amendment of section 31 (*Regulations*) (see Head 21) and the proposed new section 31A (*Matters to be specified by Director in relation to co-decision making agreements*) (see Head 22) to provide for specification by the Director of the Decision Support Service of 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. Providing for forms relating to the Act to be specified by the Director is considered to be consistent with the provisions of the Mental Health Act 2001 (No. 25) which requires forms relating to that Act to be specified by the Mental Health Commission.

Similar and related amendments are contained in:

- Head 5 amending section 9 (*Definitions – Part 3*)
- Head 6 amending section 10 (*Decision-making assistance agreement*)
- Head 12 amending section 16 (*Definitions - Part 4*)
- Head 16 amending to section 24 (*Objections to registration*)
- Head 17 amending section 27 (*Reports by co-decision-maker*)
- Head 18 amending section 28 (*Variation of co-decision-making agreement*)
- Head 21 amending section 31 (*Regulations*)
- Head 22 inserting a new section 31A (*Matters to be specified by Director in relation to co-decision-making agreements*);
- Head 36 amending section 58 (*Interpretation - Part 7*)
- Head 38 amending section 59 (*Enduring power of attorney — general*)
- Head 50 amending section 73 (*Revocation and variation of enduring power*)
- Head 52 amending section 75 (*Reports by attorney*)
- Head 57 amending section 79 (*Regulations*) of the Act of 2015
- Head 58 inserting a new section 79A (*Matters to be specified by the Director in relation to enduring powers of attorney*).

Head 14 Amendment of section 20 of Act of 2015

Provide that:

Section 20(6)(h)(iii) of the Act of 2015 is amended

by the insertion of “entered into force in respect of himself or herself” after “enduring power of attorney”.

Explanatory Note:

This Head amends section 20 (*Nullity*) of the Act of 2015 which sets out the circumstances where a co-decision-making agreement shall be null and void. One of these circumstances is where a co-decision-maker has an EPA in force, in respect of himself or herself, due to his or her own lack of capacity. Where this occurs the co-decision-agreement is null and void.

Section 20 currently refers to the registration of an Enduring Power of Attorney (EPA). The proposed new two-stage process provides that an EPA is registered at the stage of execution but that the EPA only comes into force at the second stage of the process when the EPA is notified to the Director.

This Head removes a reference to the completed EPA under the 2015 Act being ‘registered’ and inserts a reference to that type of EPA being ‘entered into force’ in line with the proposed new procedure for giving effect to EPAs.

Under the Act of 2015 an EPA may be registered when a donor loses capacity. The new process requires that an EPA is to be registered at the stage of execution of the EPA while the donor has capacity and is in a position to discuss issues with the Decision Support Service (DSS). The second step in the proposed new process provides for the attorney to notify the DSS at the stage where the donor loses capacity and at that stage the EPA is entered into force.

The proposed introduction of a two-stage EPA process will require the amendment of a number of other sections in the Act of 2015 including

- Head 8 amending section 13 (*Disqualification as decision-making assistant*)
- Head 24 amending section 40 (*Disqualification as decision-making representative*)
- Head 39 amending section 60 (*Content of instrument creating an enduring power of attorney*)
- Head 40 amending section 61 (*Notice of execution of an enduring power of attorney*)
- Head 43 amending section 66 (*Disqualification of attorney*)
- Head 44 amending section 67 (*Function of court prior to registration*)
- Head 45 amending section 68 (*Application for registration of instrument creating enduring power*)

- Head 46 to amend section 69 (*Registration of an instrument creating an enduring power of attorney*)
- Head 47 deleting section 70 (*Effect and proof of registration*)
- Head 48 amending section 71 (*Objections to registration*)
- Head 49 amending section 72 (*Register of Enduring Powers*)
- Head 50 amending section 73 (*Revocation and variation of enduring power*)
- Head 51 amending section 74 (*Disclaimer by attorney*)
- Head 52 amending section 75 (*Reports by attorney*)
- Head 54 amending section 77 (*Applications to court*)
- Head 56 inserting a new section 78A (*Notification to Director that donor lacks capacity in relation to one or more relevant decisions that are subject of enduring power of attorney*)
- Head 58 inserting a new section 79A (*Matters to be specified by the Director in relation to enduring powers of attorney*)
- Head 59 amending section 80 (*Offences in relation to enduring powers of attorney*) of the Act of 2015.

DRAFT

Head 15 Amendment of section 21 of Act of 2015⁶

Provide that:

Section 21 of the Act of 2015 is amended—

(a) in subsection (2), by the insertion of “as shall be specified by the Director under section 31A” after “in such form”,

(b) in subsection (3), by the substitution of “specified by the Director under section 31A” for “prescribed by regulations made under section 31”,

(c) by the insertion of the following subsections after subsection (3):

“(3A) Subsection (3)(a) shall not apply to the spouse or civil partner of the appointer where—

(a) a decree of judicial separation is granted to either spouse by a court in the State or any decree is so granted by a court outside the State and is recognised in the State as having like effect,

(b) a written agreement to separate is entered into between the spouses,

(c) subject to section 2(2), the spouses separate and cease to cohabit for a continuous period of 12 months,

(d) a written agreement to separate is entered into between the civil partners, or

(e) subject to section 2(2), the civil partners separate and cease to cohabit for a continuous period of 12 months.

(3B) Subsection (3)(b) shall not apply where, subject to section 2(2), the cohabitants separate and cease to cohabit for a continuous period of 12 months.”,

(d) in subsection (4)(g), by the substitution of “specified by the Director under section 31A” for “prescribed by regulations made under section 31”.

⁶ The drafting of this amendment was approved by the previous Government for introduction at Dáil Report Stage of the lapsed Disability (Miscellaneous Provisions) Bill 2016.

Explanatory Note:

The purpose of this Head is to amend section 21 (*Application for registration of co-decision-making agreement*) of the Act of 2015.

The proposed amendments in paragraphs (a), (b) and (d) are related to and consequential to the proposed amendments to section 31 (*Regulations*) (see Head 21) and the proposed new section 31A (*Matters to be specified by Director in relation to co-decision making agreements*) (see Head 22) to provide for specification by the Director of the Decision Support Service of certain matters.

This Head also provides for two new subsections (3A) and (3B) to ensure that the notice requirements relating to application 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. Currently the 2015 Act requires the relevant person to notify his or her spouse, civil partner or cohabitant when they apply to register a co-decision agreement and to supply them with a copy of the agreement. They can then submit an objection to the registration of the agreement to the Director. This is considered inappropriate for spouses, civil partners or cohabitants who are separated or have not lived together for 12 months. Circumstances could arise where such a person might object to a support arrangement involving a new partner even if that were the explicit wish of the person seeking to put the decision support arrangement in place on their own behalf. Similar amendments are in Head 23 amending section 36 in relation to notice provisions for making an application to court under Part 5, in Head 45 amending section 68 in relation to the notice provisions for registering an enduring power of attorney and in Head 56 inserting a new section 78A (*Notification to Director that donor lacks capacity in relation to one or more relevant decisions that are subject of enduring power of attorney*).

Notice requirements in relation to decision-making assistance agreements are not set out in the 2015 Act but will be prescribed by the Minister in Regulations under section 10 (*Decision-making assistance agreement*). An exception to notice requirements for relationships that are no longer subsisting will need to be included in those Regulations for consistency.

Notice requirements in relation to Advance Healthcare Directives are not set out in the 2015 Act but may be prescribed by the Minister for Health in Regulations under section 84 (*Making of advance healthcare directives, etc.*).

Related amendments are required to include the following in the lists of persons ineligible to become decision supporters; spouses, civil partners or cohabitants who are separated or have not lived together for 12 months and spouses or civil partners where the marriage is annulled or dissolved or there is a decree of judicial separation granted and also to disqualify spouses, civil partners or cohabitants who are separated or have not lived together for 12 months from being the decision supporter when the separation occurs after they have been appointed to the role.

Head 16 Amendment of section 24 of Act of 2015

Provide that:

Section 24 of the Act of 2015 is amended, in subsection (2),

by the insertion of the words “as shall be specified by the Director under section 31A” following “in such form”.

Explanatory Note:

The proposed amendment to section 24 (*Objections to registration*) of the Act of 2015 is related to and consequential to the proposed amendments to section 31 (*Regulations*) (see Head 21) and the proposed new section 31A (*Matters to be specified by Director in relation to co-decision making agreements*) (see Head 22) to provide for specification by the Director of the Decision Support Service of 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. Providing for forms relating to the Act to be specified by the Director is considered to be consistent with the provisions of the Mental Health Act 2001 (No. 25) which requires forms relating to that Act to be specified by the Mental Health Commission.

Similar and related amendments are contained in:

- Head 5 amending section 9 (*Definitions – Part 3*)
- Head 6 amending section 10 (*Decision-making assistance agreement*)
- Head 12 amending section 16 (*Definitions - Part 4*)
- Head 13 amending section 17 (*Co-decision-making agreement*)
- Head 17 amending section 27 (*Reports by co-decision-maker*)
- Head 18 amending section 28 (*Variation of co-decision-making agreement*)
- Head 21 amending section 31 (*Regulations*)
- Head 22 inserting a new section 31A (*Matters to be specified by Director in relation to co-decision-making agreements*);
- Head 36 amending section 58 (*Interpretation - Part 7*)
- Head 38 amending section 59 (*Enduring power of attorney – general*)
- Head 50 amending section 73 (*Revocation and variation of enduring power*)
- Head 52 amending section 75 (*Reports by attorney*)
- Head 57 amending section 79 (*Regulations*) of the Act of 2015
- Head 58 inserting a new section 79A (*Matters to be specified by the Director in relation to enduring powers of attorney*).

Head 17 Amendment of section 27 of Act of 2015

Provide that:

Section 27 of the Act of 2015 is amended—

(a) in subsection (2)—

(i) by the substitution of “specified by the Director under section 31A” for “prescribed by regulations made under section 31”,

(ii) by the substitution of “as are specified under section 31A” for “as are prescribed”,

(b) in subsection (4)(a)—

(i) by the substitution of “specifications made by the Director under section 31A” for “regulations made under section 31”,

(ii) by the substitution of “relevant specifications” for “relevant regulations”.

Explanatory Note:

This Head provides for an amendment to section 27 (*Reports by co-decision-maker*) of the Act of 2015 and is related to and consequential to the proposed amendment to section 31 (*Regulations*) (see Head 21) and the proposed new section 31A (*Matters to be specified by Director in relation to co-decision making agreements*) (see Head 22) to provide for specification by the Director of the Decision Support Service of 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. Providing for forms relating to the Act to be specified by the Director is considered to be consistent with the provisions of the Mental Health Act 2001 (No. 25) which requires forms relating to that Act to be specified by the Mental Health Commission.

Similar and related amendments are contained in:

- Head 5 amending section 9 (*Definitions – Part 3*)
- Head 6 amending section 10 (*Decision-making assistance agreement*)
- Head 12 amending section 16 (*Definitions - Part 4*)
- Head 13 amending section 17 (*Co-decision-making agreement*)
- Head 16 amending to section 24 (*Objections to registration*)
- Head 18 amending section 28 (*Variation of co-decision-making agreement*)
- Head 21 amending section 31 (*Regulations*)
- Head 22 inserting a new section 31A (*Matters to be specified by Director in relation to co-decision-making agreements*);

- Head 36 amending section 58 (*Interpretation - Part 7*)
- Head 38 amending section 59 (*Enduring power of attorney — general*)
- Head 50 amending section 73 (*Revocation and variation of enduring power*)
- Head 52 amending section 75 (*Reports by attorney*)
- Head 57 amending section 79 (*Regulations*) of the Act of 2015
- Head 58 inserting a new section 79A (*Matters to be specified by the Director in relation to enduring powers of attorney*).

DRAFT

Head 18 Amendment of section 28 of Act of 2015

Provide that:

Section 28 of the Act of 2015 is amended—

(a) in subsection (3), by the insertion of “as shall be specified by the Director under section 31A” after “in such form”,

(b) in subsection (4), by the substitution of “specified by the Director under section 31A” for “prescribed by regulations made under section 31”.

Explanatory Note:

This Head provides for an amendment to section 28 (*Variation of co-decision-making agreement*) of the Act of 2015 and is related to and consequential to the proposed amendment to section 31 (*Regulations*) (see Head 21) and the proposed new section 31A (*Matters to be specified by Director*) (see Head 22) which provides for the specification by the Director of the Decision Support Service of 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. Providing for forms relating to the Act to be specified by the Director is considered to be consistent with the provisions of the Mental Health Act 2001 (No. 25) which requires forms relating to that Act to be specified by the Mental Health Commission.

Similar and related amendments are contained in:

- Head 5 amending section 9 (*Definitions – Part 3*)
- Head 6 amending section 10 (*Decision-making assistance agreement*)
- Head 12 amending section 16 (*Definitions - Part 4*)
- Head 13 amending section 17 (*Co-decision-making agreement*)
- Head 16 amending to section 24 (*Objections to registration*)
- Head 17 amending section 27 (*Reports by co-decision-maker*)
- Head 21 amending section 31 (*Regulations*)
- Head 22 inserting a new section 31A (*Matters to be specified by Director in relation to co-decision-making agreements*);
- Head 36 amending section 58 (*Interpretation - Part 7*)
- Head 38 amending section 59 (*Enduring power of attorney — general*)
- Head 50 amending section 73 (*Revocation and variation of enduring power*)
- Head 52 amending section 75 (*Reports by attorney*)
- Head 57 amending section 79 (*Regulations*) of the Act of 2015
- Head 58 inserting a new section 79A (*Matters to be specified by the Director in relation to enduring powers of attorney*).

Head 19 Amendment of section 29 of Act of 2015⁷

Provide that:

Section 29 of the Act of 2015 is amended—

(a) in subsection (2), by the substitution of “specified by the Director under section 31A” for “prescribed by regulations made under section 31”,

(b) in subsection (3), by the substitution of “and each such signature” for “and, in the case of a revocation by the appointer, his or her signature”,

(c) in subsection (4), by the substitution of the following for “as the case may be.”:

“as the case may be, and the notification shall be accompanied by the following:

(a) a statement by the person making the revocation outlining why the revocation is considered necessary;

(b) if the appointer is the person making the revocation, a statement by a registered medical practitioner and a statement by such other healthcare professional as shall be prescribed by regulations made under section 31 that in his or her opinion, the appointer has capacity to revoke the co-decision-making agreement;

(c) details of the notice given pursuant to subsection (4A);

(d) any change in information provided pursuant to section 21(4)(e) in the application to register the co-decision making agreement;

(e) the appropriate fee.”

(d) by the insertion of the following subsection after subsection (4):

“(4A) The person making the revocation or revocation in part of a registered co-decision-making agreement shall, at the same time as notifying the Director of the revocation or revocation in part, give notice, in such form as shall be specified by the Director under section 31A, to the persons specified in section 21(3).”

(e) by the substitution of the following for subsection (5):

“(5) Upon receipt of a notification under *subsection (4)* the Director shall—

⁷ The drafting of amendments set out in paragraphs (b) to (e) was approved by the previous Government for introduction at Dáil Report Stage of the lapsed Disability (Miscellaneous Provisions) Bill 2016.

- (a) where the revocation concerns the whole of the co-decision-making agreement concerned, remove the co-decision-making agreement to which the revocation relates from the Register, and
- (b) where the revocation is a revocation in part, identify on the Register the extent of the revocation.”.

Explanatory Note:

This Head provides for an amendment to section 29 (*Revocation of co-decision-making agreement and removal from Register*) of the Act of 2015 where there is a revocation, or revocation in part, of a co-decision-making agreement. These amendments are consistent with the procedures for variation of a co-decision-making agreement provided for in section 28 (*Variation of co-decision making agreement*). The General Scheme provides for consequential amendments to section 31A (*Matters to be specified by Director in relation to co-decision making agreements*) which provide for the specification by the Director of certain matters concerning co-decision-making agreements.

The amendment to subsection (2) is related to and consequential to the proposed amendments to section 31 (*Regulations*) (see Head 21) and the proposed new section 31A (*Matters to be specified by Director in relation to co-decision making agreements*) (see Head 22) to provide for specification of certain matters by the Director of the Decision Support Service.

The amended subsection (3) clarifies that the signature of all persons who sign a revocation must be acknowledged by witnesses. In the 2015 Act only the appointer’s signature needed to be witnessed (and not the co-decision-maker’s signature).

The proposed amendments to subsection (4) introduce a requirement to provide the Director with information as follows:

- a) the reason for the revocation;
- b) the notification to the Director of revocation of a registered co-decision-making agreement will be accompanied by a number of documents and statements if it is the appointer making the revocation. It must be accompanied by statements by a registered medical practitioner and another healthcare professional that in his or her opinion the appointer has the capacity to make the revocation. Such statements are required to make a co-decision-making agreement and it follows that similar statements should be required to make a revocation;
- c) details of the notice given;
- d) any change in information since registration and
- e) the fee for the Decision Support Service to process the revocation.

The new subsection (4A) provides that the person making the revocation or revocation in part will be required to notify those notified of the original application to register the co-decision-making agreement.

The substituted subsection (5) removes the requirement for the Director to provide notification of the revocation. The remainder of the current text providing that the Director may amend the Register to remove a revoked agreement or may record additional information on the Register to reflect a part revocation is retained.

DRAFT

Head 20 Amendment of section 30 of Act of 2015

Provide that:

Section 30 of the Act of 2015 is amended—

(a) by substituting “co-decision-making agreements” for “co-decision-makers” in the shoulder note

(b) in subsection (1)(e), by the insertion of “vary or revoke” before “the co decision-making agreement;”

(c) in subsection (2) –

(i) by the substitution in paragraph (b) of “same, or” for “same.”

(ii) by the insertion of the following after paragraph (b)

“(c) where he or she is of the view that the complaint is well founded but that -

(i) mere clarification of the co-decision-maker role is a more appropriate resolution, or

(ii) the subject matter of the complaint is otherwise better addressed under section 96(4),

the Director may, within 21 days of having completed his or her investigation, and having obtained the written consent of the complainant and the person who is the subject of the complaint and the relevant person concerned or, where the written consent of the relevant person cannot be obtained, having determined it to be, to the greatest extent possible, the will and preference of the relevant person, decline to make an application to the court and address the complaint under (i) or (ii) above.”

(d) by the insertion of the following after subsection (2)

“(3) When carrying out an investigation under this section, the provisions of section 96(2), 96(4), 96(6), 96(7) and 96(8) shall apply.

(4) Where the Director fails to secure the consent of any person under subsection (2)(c), or where he or she reasonably believes it to be the will and

preference of the relevant person concerned, he or she shall make an application to the court for a determination in relation to a matter specified in the complaint.”.

(5) A person who receives a notification under *subsection (2)(b)* may, not later than 21 days after the date of issue of the notification, appeal a decision of the Director that the complaint is not well founded to the court.

(6) The Director may, notwithstanding that no complaint has been received, on his or her own initiative carry out an investigation and make an application to the court for a determination in relation to any matter specified in *subsection (1)*.

(7) The court may—

- (a) pursuant to an application to it under *subsection (2)(a)* or *(4)*, or
- (b) pursuant to an appeal under *subsection (5)*,

make a determination in relation to a matter specified in *subsection (1)* and may, if it considers it appropriate, determine that a co-decision-maker shall no longer act as such in relation to the appointer concerned.

(8) Complaints shall be made within 12 months of the incident or knowledge of the incident. The Director may admit late complaints at his or her discretion. A late complaint not accepted by the Director can be appealed to the Court not later than 21 days after the date of issue of the Directors decision.”.

Explanatory Note

This Head provides for the amendment of *section 30 (Complaints in relation to co-decision-makers)* of the Act of 2015.

It is proposed to amend the shoulder note to *section 30* to more accurately to reflect the content of its provisions. The current shoulder note refers to co-decision-makers but other parties could attempt to use coercion or undue pressure to induce an appointer to enter into, vary or revoke a co-decision-making agreement. The shoulder note is therefore being changed to “complaints in relation to co-decision-making agreements” to provide for complaints that may be made in relation to agreements and not solely complaints in relation to the co-decision-maker.

The proposed amendment to *section 30(1)(e)* is to include as a ground for complaint that fraud, coercion or undue pressure was used to induce the appointer to vary or revoke a

decision-making agreement. This is in addition to the ground for complaint that fraud, coercion or undue pressure was used to induce the appointer to enter into the decision-making agreement. Similar amendments have been proposed in section 15 (Head 10) in relation to decision-making assistance agreements, section 47 (Head 30) in relation to decision-making representatives and in section 76 (Head 53) in relation to EPAs.

The intention with the proposed insertion of a new subsection (2)(c) is to provide a means of resolving complaints outside of application to the courts. The consent of the parties concerned is sought so that the Director is not being called on to resolve the matters in subsection (1), which could be regarded as justiciable controversies and therefore the sole purview of the courts, but is instead seeking the consent of the parties involved to set aside a justiciable controversy in favour of a more appropriate method of resolution. This is intended to prevent an undesirable binary in the Act of 2015 where all complaints, regardless of nature, are forced into the courts system once a complaint is found to be well-founded, no matter how appropriate a method of resolution that may be. Seeking the consent of the parties for an alternate resolution allows more flexible methods of resolution such as, for example, in instances of innocent mistake or misunderstanding of a co-decision maker's role.

The proposed new subsection (3) is intended to ensure that the suite of powers possessed by the Director, in relation to investigations specified in section 96, applies to investigations under this section.

The new subsection (4) provides that the Director shall apply to the court for determination of a matter specified in a complaint where the consent of the parties concerned cannot be obtained to set it aside. This course of action could be inferred from the consequences of the proposed subsection 2(c), but has been included in the General Scheme for the avoidance of doubt, and to make sure that complaints do not fall.

This Head also inserts a new subsection (8) to provide that complaints shall be made within 12 months of the incident or knowledge of the incident and that the Director may use his or her discretion to admit a late complaint.

Head 21 Amendment of section 31 of Act of 2015

Provide that:

The Act of 2015 is amended by the substitution of the following for section 31:

“31. Regulations - Part 4

The Minister, having regard to the requirements of this Part, shall prescribe by regulations the following matters:

- (a) the bodies or classes of persons under sections 25(3) and 25(4) who may inspect the Register and receive an authenticated copy of a co-decision-making agreement;
- (b) the class of healthcare professionals under section 21(4)(f), 26(3)(b), 28(4)(c) and 29(4)(b).”
- (c) the procedures for carrying out investigations of complaints under section 15, section 30 and section 47.
- (d) the fees to be paid in connection with—
 - (i) an application to register a co-decision-making agreement or varied co-decision-making agreement,
 - (ii) an objection to an application to register a co-decision-making agreement or varied co-decision-making agreement,
 - (iii) the issue of an authenticated copy of a co-decision-making agreement, and
 - (iv) the notification to the Director of the revocation or revocation in part of a co-decision-making agreement.

Explanatory Note:

This Head provides for the substitution of the current section 31 (*Regulations*) of the Act of 2015 with a new section 31 (*Regulations – Part 4*) to provide that the Minister shall prescribe the bodies or classes of persons under section 25 (*Register of co-decision making agreements*) who may inspect the Register and who may receive an authenticated copy of a co-decision making agreement.

The proposed paragraph (b) provides that the Minister shall prescribe the class of healthcare professional for the purposes of section 21(4)(f), (*Application for registration of co-decision making agreement*), section 26(3)(b) (*Review of co-decision making agreements*), section 28(4)(c) (*Variation of co-decision making agreement*) and section 29(4)(b) (*Revocation of co-decision-making agreement and removal from Register*).

Paragraph (c) provides that the Minister shall prescribe for the procedures for investigations of complaints under sections 15, 30 and 47.

Paragraph (d) provides that the Minister shall prescribe in regulations the fees to be paid in connection with—

- (i) an application to register a co-decision-making agreement or varied co-decision-making agreement,
- (ii) an objection to an application to register a co-decision-making agreement or varied co-decision-making agreement,
- (iii) the issue of an authenticated copy of a co-decision-making agreement, and
- (iv) the notification to the Director of the revocation or revocation in part of a co-decision-making agreement.

The proposed amendments remove the need for forms to be prescribed by the Minister by regulation. Forms will instead be specified by the Director under Head 22, which inserts a new section 31A (*Matters to be specified by Director in relation to co-decision-making agreements*). Providing for forms relating to the Act to be specified by the Director is considered to be consistent with the provisions of the Mental Health Act 2001 (No. 25) which requires forms relating to that Act to be specified by the Mental Health Commission.

Similar and related amendments are contained in:

- Head 5 amending section 9 (*Definitions – Part 3*)
- Head 6 amending section 10 (*Decision-making assistance agreement*)
- Head 12 amending section 16 (*Definitions - Part 4*)
- Head 13 amending section 17 (*Co-decision-making agreement*)
- Head 16 amending to section 24 (*Objections to registration*)
- Head 17 amending section 27 (*Reports by co-decision-maker*)
- Head 18 amending section 28 (*Variation of co-decision-making agreement*)
- Head 22 inserting a new section 31A (*Matters to be specified by Director in relation to co-decision-making agreements*);
- Head 36 amending section 58 (*Interpretation - Part 7*)
- Head 38 amending section 59 (*Enduring power of attorney — general*)
- Head 50 amending section 73 (*Revocation and variation of enduring power*)
- Head 52 amending section 75 (*Reports by attorney*)
- Head 57 amending section 79 (*Regulations*) of the Act of 2015
- Head 58 inserting a new section 79A (*Matters to be specified by the Director in relation to enduring powers of attorney*).

Head 22 NEW SECTION 31A - Matters to be specified by Director in relation to co-decision-making agreements

Provide that:

The Act of 2015 is amended by the insertion of the following new section after section 31:

“31A. (1) The Director, having consulted with the Minister and, if so directed, in accordance with the terms of any direction made by the Minister, shall, in the performance of his or her functions under the provisions of this Act and the requirements of this Part, specify the following matters:

- (a) the form of a co-decision-making agreement ;
- (b) the form of an application under sections 21(2) and 28(3) to register a co-decision-making agreement and varied co-decision-making agreement;
- (c) the form of notice under sections 21(3) and 28(4) of an application to register a co-decision-making agreement and varied co-decision-making agreement;
- (d) the form of an objection under section 24 to the registration of a co-decision-making agreement and varied co-decision-making agreement;
- (e) the form of a report under section 27 to be submitted by a co-decision-maker to the Director;
- (f) the form of revocation under section 29 (2) of a co-decision-making agreement;
- (g) the form of notification under section 29(4A)
- (h) the form of references under section 21(4)(g) as to the personal character of a co-decision-maker;

(2) The Director shall have regard to the following principles in the preparation of forms under subsection (1) –

- (a) Forms shall clearly set out the required information in concise and easily understood language and duplication of information shall be avoided in so far as practicable;
- (b) Forms shall be made available in accessible formats, including in an easy to read version.
- (c) The implications (if any) of the proposed intervention for the rights of relevant persons, for potential interveners or for other interested parties, including

family members, shall be identified and applicable Guiding Principles including the obligation to respect the relevant person's will and preferences, shall be set out.

(d) The relevant data protection provisions shall be included.”.

Explanatory Note:

This Head provides for a number of provisions currently in section 31 (*Regulations*) of the Act of 2015 to be transferred into a new section 31A (*Matters to be specified by Director in relation to co-decision making agreements*) to provide for specification by the Director of the Decision Support Service of forms.

The purpose of the proposed new section 31A is to enable 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. A discretionary direction-making power has been reserved for the Minister to ensure oversight but it is not intended to be exercised unless required.

Providing for forms relating to the Act to be specified by the Director is consistent with the provisions of the Mental Health Act 2001 (No. 25) which requires forms relating to that Act to be specified by the Mental Health Commission.

This Head also provides for a new section 31A(1)(g) which provides that the form of notification of a revocation to be issued to persons originally notified of a co-decision-making agreement shall be specified by the Director. The requirement currently provided for in section 29(5) for the Director to carry out such notification is proposed to be removed. A new subsection (4A) is proposed in Head 19 to provide for a person making a revocation or revocation in part to notify those persons who were notified of the original application to register the co-decision-making agreement. The amendment in this Head provides for the Director to specify the form for the notification of revocation.

Similar and related amendments are contained in:

- Head 5 amending section 9 (*Definitions – Part 3*)
- Head 6 amending section 10 (*Decision-making assistance agreement*)
- Head 12 amending section 16 (*Definitions - Part 4*)
- Head 13 amending section 17 (*Co-decision-making agreement*)
- Head 16 amending to section 24 (*Objections to registration*)
- Head 17 amending section 27 (*Reports by co-decision-maker*)
- Head 18 amending section 28 (*Variation of co-decision-making agreement*)
- Head 21 amending section 31 (*Regulations*)
- Head 36 amending section 58 (*Interpretation - Part 7*)
- Head 38 amending section 59 (*Enduring power of attorney – general*)
- Head 50 amending section 73 (*Revocation and variation of enduring power*)
- Head 52 amending section 75 (*Reports by attorney*)
- Head 57 amending section 79 (*Regulations*) of the Act of 2015

- Head 58 inserting a new section 79A (*Matters to be specified by the Director in relation to enduring powers of attorney*).

Head 23 Amendment of section 36 of Act of 2015⁸

Provide that:

Section 36 of the Act of 2015 is amended—

- (a) in subsection (2)(b), by the substitution of “paragraphs (c) to (i) and paragraphs (k) and (l) of subsection (4)” for “paragraphs (c) to (i) of subsection (4)”
- (b) by the insertion of a new subsection (2A)
- “(2A) Subsection (2)(b) is not applicable in respect of persons referred to in paragraph (c) of subsection (4) where –
- (a) a decree of judicial separation is granted to either spouse by a court in the State or any decree is so granted by a court outside the State and is recognised in the State as having like effect,
- (b) a written agreement to separate is entered into between the spouses,
- (c) subject to section 2(2), the spouses separate and cease to cohabit for a continuous period of 12 months,
- (d) a written agreement to separate is entered into between the civil partners, or
- (e) subject to section 2(2), the civil partners separate and cease to cohabit for a continuous period of 12 months.
- (f) subject to section 2(2), the cohabitants separate and cease to cohabit for a continuous period of 12 months.

(c) in subsection (4), by the substitution of the following for paragraph (g):

“(g) an attorney or attorney under the Act of 1996 for the relevant person,”,

(d) in subsection (4), by the insertion of the following after paragraph (j):

⁸ The drafting of this amendment was approved by the previous Government for introduction at Dáil Report Stage of the lapsed Disability (Miscellaneous Provisions) Bill 2016.

“(k) the cohabitant of the relevant person

(l) a child of the relevant person who has attained the age of 18 years.”

(e) in subsection (8)(b), by the insertion of “, having regard to the known will and preferences of the relevant person,” after “the court”,

(f) by the deletion of subsection (10)(b)

Explanatory Note:

This Head provides for amendments to section 36 (*Persons who may make applications under this Part*) of the Act of 2015.

The proposed new subsection (2A) provides that notice requirements are not applicable in respect of spouses, civil partners or cohabitants if they have separated or have not lived together for 12 months. Currently the Act of 2015 requires the relevant person to notify their spouse or civil partner when they make an application to court. This is not appropriate for spouses or civil partners who are separated or have not lived together for 12 months. Similar amendments are in Head 15 amending section 21 in relation to notice provisions for registering co-decision-making agreements, Head 45 amending section 68 in relation to the notice provisions for registering an enduring power of attorney and in Head 56 inserting the new section 78A (*Notification to Director that donor lacks capacity in relation to one or more relevant decisions that are subject of enduring power of attorney*). .

The proposed amendment to subsection (4) clarifies that an attorney appointed under an enduring power under the Powers of Attorney Act 1996 (No. 12) can make an application to the court under section 36 without first seeking the approval of the court. Currently under the 2015 Act the following persons may make an application to the court under Part 5 without first seeking the approval of the court:

- a) the relevant person
- b) the Director
- c) the spouse or civil partner of the relevant person
- d) a decision-making assistant for the relevant person
- e) a co-decision-maker for the relevant person
- f) a decision-making representative for the relevant person
- g) an attorney for the relevant person
- h) a designated healthcare representative for the relevant person
- i) a person specified for that purpose in an existing order of the court under this Part where the application relates to that order
- j) if the application relates, whether in whole or in part, to the relevant person’s capacity to make a decision to consent to being married or to being in a civil partnership -
 - i. a registrar within the meaning of Section 17 of the Civil Registration Act 2004,
or

- ii. the other party to the proposed marriage or civil partnership (if any), as the case may be, of the relevant person.

An attorney appointed under an enduring power under the Powers of Attorney Act 1996 is not included in this list. It is considered that such attorneys should be included as they provide a similar service to a relevant person as an attorney appointed under the Act of 2015 and should be treated equally in that Act. A similar amendment is included in Head 61 in relation to Section 92 (*Persons who may make applications to relevant court under this Part, etc.*).

Section 8(b) is proposed to be amended to clarify that the court must have regard to the known will and preferences of the relevant person before permitting a person other than a legal representative or court friend to assist the relevant person.

The proposed deletion of subsection (10)(b) removes the requirement for hearings of applications to be heard and determined otherwise than in public. Wardship hearings are currently not held in camera although the court may impose restrictions on publication in sensitive cases. Provisions regarding hearings in relation to AHDs under Part 8 are not being amended and will be held otherwise than in public under section 92(7)(b).

DRAFT

Head 24 Amendment of Section 40 of Act of 2015

Provide that:

Section 40(4)(h)(iii) of the Act of 2015 is amended

by the insertion of “entered into force in respect of himself or herself” after the words “enduring power of attorney”.

Explanatory Note:

This Head amends section 40 (*Disqualification as decision-making representative*) of the Act of 2015 which lists the circumstances whereby a decision-making representative shall be disqualified from acting in that role. One of these circumstances is where a decision-making representative has an EPA in force in respect of himself or herself due to his or her lack of capacity. When this occurs the decision-making representative will be disqualified from acting in that role. Under the Act of 2015 a decision making representative is disqualified from acting in that role from the date on which his or her EPA was registered. Under the proposed new scheme the relevant date would be the date of entry into force of the EPA which is the second stage of the two step process. i.e. when the Director is notified of the EPA.

This Head removes a reference to the Enduring Power of Attorney (EPA) completed under the 2015 Act being registered and inserts a reference to that type of EPA entering into force in line with the proposed new procedure for giving effect to EPAs.

Under the Act of 2015 an EPA may be registered when a donor loses capacity. The new process requires that an EPA is to be registered at the stage of execution of the EPA while the donor has capacity and is in a position to discuss issues with the Decision Support Service (DSS). The second step in the proposed new process provides for the attorney to notify the DSS at the stage where the donor loses capacity and at that stage the EPA is entered into force.

The proposed introduction of a two-stage process will require the amendment of a number of other sections in the Act of 2015 including

- Head 8 amending section 13 (*Disqualification as decision-making assistant*)
- Head 14 amending section 20 (*Nullity*)
- Head 39 amending section 60 (*Content of instrument creating an enduring power of attorney*)
- Head 40 amending section 61 (*Notice of execution of an enduring power of attorney*)
- Head 43 amending section 66 (*Disqualification of attorney*)
- Head 44 amending section 67 (*Function of court prior to registration*)
- Head 45 amending section 68 (*Application for registration of instrument creating enduring power*)

- Head 46 to amend section 69 (*Registration of an instrument creating an enduring power of attorney*)
- Head 47 deleting section 70 (*Effect and proof of registration*)
- Head 48 amending section 71 (*Objections to registration*)
- Head 49 amending section 72 (*Register of Enduring Powers*)
- Head 50 amending section 73 (*Revocation and variation of enduring power*)
- Head 51 amending section 74 (*Disclaimer by attorney*)
- Head 52 amending section 75 (*Reports by attorney*)
- Head 54 amending section 77 (*Applications to court*)
- Head 56 inserting a new section 78A (*Notification to Director that donor lacks capacity in relation to one or more relevant decisions that are subject of enduring power of attorney*)
- Head 58 inserting a new section 79A (*Matters to be specified by the Director in relation to enduring powers of attorney*)
- Head 59 amending section 80 (*Offences in relation to enduring powers of attorney*) of the Act of 2015.

DRAFT

Head 25 Amendment of section 42 of Act of 2015

Provide that

Section 42 of the Act of 2015 is amended by the insertion of the following after subsection (2):

“(3) In a case where the court orders or directs under subsection (1) or (2) that a decision-making representative appointed by the court in the circumstances to which section 38(7) applies cannot be reimbursed for reasonable expenses or where a decision-making representative cannot obtain the reasonable remuneration referred to in those subsections from the assets of the relevant person, the decision-making representative may be appointed subject to such conditions, and may be reimbursed for reasonable expenses and paid remuneration by the Director, as the Minister, with the consent of the Minister for Public Expenditure and Reform, may determine.

(4) The remuneration and reimbursement of expenses to be paid by the Director to a decision-making representative appointed under subsection (3) shall be in accordance with such conditions (including those relating to remuneration and expenses) as prescribed by the Minister, with the consent of the Minister for Public Expenditure and Reform.”.

Explanatory Note:

The purpose of this Head is to amend section 42 (*Remuneration and expenses*) of the Act of 2015 to make provision for the expenses and remuneration of decision-making representatives appointed by the court from the panel established by the Director of the Decision Support Service (DSS) to be paid by the DSS in cases where the court orders that such expenses and remuneration cannot be met from the assets of the relevant person due to an insubstantial estate. The Act of 2015 does not make provision for this.

The Head also provides for the conditions in relation to remuneration and expenses, including fee amounts and a maximum amount, to be set by the Minister, with the consent of the Minister for Public Expenditure and Reform.

Head 26 Amendment of section 43 of Act of 2015

Provide that

The Act of 2015 is amended in section 43 –

by the deletion of subsections (3), (4) and (5).

Explanatory Note:

This Head amends section 43 (*Scope of decision-making order or decision-making representation order relating to property and affairs*) of the Act of 2015 to remove the provision allowing the court to confer on the Director the custody, control and management of some or all of the property of a relevant person.

The role of property management is not appropriate for the Director of the Decision Support Service (DSS) and is considered to be a role more suited to a decision-making representative (DMR). DMRs with financial and property management expertise will be available from the panel maintained by the DSS for the Court to draw from as necessary. DMRs will also be able to engage and procure appropriate specialists and services as appropriate or in line with any court order in order to enable them to carry out their property management role.

Head 27 Amendment of section 44 of Act of 2015

Provide that

The Act of 2015 is amended in section 44 –

- (a) by the deletion of subsection (5)
- (b) by the deletion of subsection (6)
- (c) by the deletion of subsection (7)
- (d) by the deletion of subsection (8)

Explanatory Note:

This Head provides for an amendment to section 44 (*Restrictions on decision-making representatives*) for the purpose of removing provisions relating to restraint of a relevant person. Significant concerns were expressed by stakeholders at the inclusion of these provisions in the Act of 2015 and following consideration, the decision has been taken that these provisions should be deleted. These provisions related to the use of restraint in private settings by decision supporters. They did not encompass the use of restraint in institutional settings which will continue to be governed by relevant legislation and guidelines.

A similar amendment is included in Head 41 amending section 62 (*Scope of Authority – personal welfare decisions*) of the Act of 2015.

Head 28 Amendment of section 45 of Act of 2015

Provide that

Section 45 of the Act of 2015 is amended by the insertion of the following after subsection (4)

“(5) An authenticated copy of a decision-making representation order issued by the Decision Support Service under this section shall be a time-stamped document generated from the Register of the Decision Support Service that has been entered into the Register by the Decision Support Service.”.

Explanatory Note:

This Head provides for an amendment to section 45 (*Register of decision-making representation orders*) of the Act of 2015, in line with DSS digital first policy, to allow for the Director to provide a time-stamped document generated from the Register as an authenticated copy of a decision-making representation order.

Related digital first amendments are in Head 69 inserting a new section 101A (*Digital signature*) and Head 73 inserting a new section 142A (*Documents in electronic form and transmission of documents by electronic means*)

Head 29 Amendment of section 46 of Act of 2015⁹

Provide that:

Section 46 of the Act of 2015 is amended—

- (a) in subsection (3), by the substitution of “specified by the Director” for “prescribed by regulations made by the Minister”,
- (b) by the deletion of subsection (4),
- (c) in subsection (6)(b), by the insertion of “, by a general visitor” after “Director”
- (d) in subsection (8)(a)—
 - (i) by the substitution of “specifications made by the Director under subsection (3)” for “regulations made by the Minister”,
 - (ii) by the substitution of “relevant specifications” for “relevant regulations”.

Explanatory Note:

This Head provides for the amendment of section 46 (*Reports by decision-making representative*) of the Act of 2015, which makes provision for annual reports by decision-making representatives to the Director of the Decision Support Service.

The purpose of the proposed amendment to section 46(3) is to enable the Director of the Decision Support Service to specify the form of reports to be made by decision-making representatives, rather than requiring the form to be prescribed by regulations made by the Minister.

Providing for forms relating to the Act to be specified by the Director is consistent with the provisions of the Mental Health Act 2001 which require forms relating to that Act to be specified by the Mental Health Commission.

The proposed deletion of subsection (4) is consequential on the policy decision to remove provisions relating to restraint from the Act of 2015 (Heads 27 and 41).

Section 46(6) requires a decision-making representative who has authority to make decisions in relation to a person’s property and affairs to keep proper accounts and financial records in respect of the person’s income and expenditure. The decision-making representative must submit the accounts and records as part of a report to the Director and

⁹ The amendment to section 46(6)(b) of the Act was brought forward at Committee Stage of the Disability (Miscellaneous Provisions) Bill on 30 January 2019.

make the accounts and records available for inspection by the Director or by a special visitor.

Section 99 (*Special visitors and general visitors*) of the Act gives the Director of the Decision Support Service the power to appoint a person to be a special visitor or a general visitor. A special visitor is a medical practitioner or other person with particular knowledge, expertise and experience as respects the capacity of persons. A general visitor is a person who possesses relevant qualifications, expertise or experience to assist the Director in supervising decision-making representatives, co-decision-makers, attorneys, designated healthcare representatives and decision-making assistants.

The reference to visitors in subsection (6)(b) should include both general and special visitors as both may need to review accounts and records as part of an assessment of capacity relating to decisions about the person's finances. In order to conduct a functional assessment of capacity, the person assessing capacity may need to take up a range of records. The amendment has been updated since it was approved by Government to require decision-making representatives with decision-making authority in relation to property and affairs to make financial accounts and records available for inspection by the Director, by a general visitor or by a special visitor. A similar amendment is included in Head 52 in relation to section 75 (*Reports by attorney*) to provide for attorneys to make financial accounts available to both general and special visitors. This is to facilitate investigations, where necessary, by the Director of the Decision Support Service.

The proposed amendments to subsection (8)(a) are consequential to the proposed amendments to subsection (3).

Head 30 Amendment of section 47 of Act of 2015

Provide that:

Section 47 of the Act of 2015 is amended, in subsection (2)—

(c) in subsection (2)—

(i) in paragraph (a), by the insertion of “and within 12 weeks of receipt of the complaint under subsection (1) may” before “make an application”, and

(ii) in paragraph (b), by the insertion of “and within 12 weeks of receipt of the complaint under subsection (1) shall” before “notify”

(c) in subsection (2) –

(i) by the substitution in paragraph (b) of “same, or” for “same.”

(ii) by the insertion of the following after paragraph (b)

“(c) where he or she is of the view that the complaint is well founded but that -

(iii) mere clarification of the decision-making representative role is a more appropriate resolution, or

(iv) the subject matter of the complaint is otherwise better addressed under section 96(4),

the Director may, within 21 days of having completed his or her investigation, and having obtained the written consent of the complainant and the person who is the subject of the complaint and the relevant person concerned or, where the written consent of the relevant person cannot be obtained, having determined it to be, to the greatest extent possible, the will and preference of the relevant person, decline to make an application to the court and address the complaint under (i) or (ii) above.

(d) by the insertion of the following after subsection (2)

“(3) When carrying out an investigation under this section, the provisions of section 96(2), 96(4), 96(6), 96(7) and 96(8) shall apply.

(4) Where the Director fails to secure the consent of any person under subsection (2)(c), or where he or she reasonably believes it to be the will and preference of the relevant person concerned, he or she shall make an application to the court for a determination in relation to a matter specified in the complaint.”.

(5) A person who receives a notification under *subsection (2)(b)* may, not later than 21 days after the date of issue of the notification, appeal a decision of the Director that the complaint is not well founded to the court.

(6) The Director may, notwithstanding that no complaint has been received, on his or her own initiative carry out an investigation and make an application to the court for a determination in relation to any matter specified in *subsection (1)*.

(7) The court may—

- (c) pursuant to an application to it under *subsection (2)(a)* or (4), or
- (d) pursuant to an appeal under subsection (5),

make a determination in relation to a matter specified in subsection (1) and may, if it considers it appropriate, determine that a decision-making representative shall no longer act as such in relation to the appointer concerned.

(8) Complaints shall be made within 12 months of the incident or knowledge of the incident. The Director may admit late complaints at his or her discretion. A late complaint not accepted by the Director can be appealed to the Court not later than 21 days after the date of issue of the Directors decision.”.

Explanatory Note

This Head provides for the amendment of section 47 (*Complaints in relation to decision-making representatives*) of the Act of 2015.

The intention with the proposed insertion of a new subsection (2)(c) is to provide a means of resolving complaints outside of application to the courts. The consent of the parties concerned is sought so that the Director is not being called on to resolve the matters in subsection (1), which could be regarded as justiciable controversies and therefore the sole purview of the courts, but is instead seeking the consent of the parties involved to set aside a justiciable controversy in favour of a more appropriate method of resolution. This is intended to prevent an undesirable binary in the Act of 2015 where all complaints, regardless of nature, are forced into the courts system once a complaint is found to be well-founded, no matter how appropriate a method of resolution that may be. Seeking the consent of the parties for an alternate resolution allows more flexible methods of resolution such as, for example, in instances of innocent mistake or misunderstanding of a decision supporter’s role.

The proposed new subsection (3) is intended to make sure that the suite of powers possessed by the Director in relation to investigations, specified in section 96, apply to investigations here.

The new subsection (4) provides that the Director shall apply to the court for determination of a matter specified in a complaint where the consent of the parties concerned cannot be obtained to set it aside. This course of action could be inferred from the consequences of the proposed subsection 2(c), but has been included in the General Scheme for the avoidance of doubt, and to make sure that complaints do not fall.

This Head also inserts a new subsection (8) to provide that complaints shall be made within 12 months of the incident or knowledge of the incident and that the Director may use his or her discretion to admit a late complaint.

DRAFT

Head 31 Amendment of section 50 of Act of 2015

Provide that

Section 50 of the Act of 2015 is amended in subsection (2)(a) –

by the deletion of the words “(including reports relating to the cognitive ability of that person)” after “application”.

Explanatory Note:

This Head provides for the deletion of the term ‘cognitive ability’ from section 50 (*Expert reports*) of the Act of 2015. Cognitive ability is not a term that is used elsewhere in the Act and the policy intention is to replace it with a functional assessment of capacity, whereby capacity is assessed in a time and issue specific manner rather than an all or nothing medical-status focused process.

Head 32 Amendment of section 54 of Act of 2015 ¹⁰

Provide that:

Section 54 of the Act of 2015 is amended—

(a) by the substitution of the following for subsection (1):

“(1) An application for a declaration under section 55(1) in respect of a ward who has attained the age of 18 years by the date of commencement of this Part may be made to the wardship court at any time—

(a) by the ward, or the committee of the ward,

(b) with the consent of the court, by—

(i) a relative or friend of the ward who has had such personal contact with the ward over such period of time that a relationship of trust exists between them, or

(ii) such other person as appears to the wardship court to have a sufficient interest or expertise in the welfare of the ward.

(c) by the insertion of the following subsections after subsection (3):

“(3A) The wardship court, on an application being made to it under subsection (1), or in proceedings pursuant to subsection (2) or (3), may allow the ward, if he or she has not instructed a legal practitioner, to be assisted in court by a court friend for the ward unless, subject to sections 100(12) and 103(15), there is another person (in this section referred to as a “person who falls within subsection (3A)”) in respect of whom the court, having regard to the known will and preferences of the ward, is satisfied that such person is suitable, willing and able to assist the ward during the course of the hearing.

(3B) Where, on an application being made to the wardship court under subsection (1), or in proceedings pursuant to subsection (2) or (3)—

(a) the ward the subject of the application has not instructed a legal practitioner,

(b) there is no person who falls within subsection (3A) in respect of the ward,

¹⁰ The drafting of this amendment was approved by the previous Government for introduction at Dáil Report Stage of the lapsed Disability (Miscellaneous Provisions) Bill 2016.

(c) there is no court friend for the relevant person, and

(d) there is no committee of the ward,

the wardship court may direct the Director to appoint a court friend for the ward.

(3C) Proceedings under this section shall be conducted with the least amount of formality consistent with the proper administration of justice.

Explanatory Note:

This Head provides for the amendment of section 54 (*Review of capacity of wards who are adults*) of the Act of 2015.

The purpose of the Head is to provide for consistency between the court procedures provided for in Part 5 of the Act of 2015 in respect of relevant persons and those procedures in Part 6 in relation to reviews of capacity of existing wards of court, in order to remove disparities between relevant persons and wards and to address gaps in the current provisions of the Act.

The proposed substitution of a new section 54(1) removes the necessity for a ward to seek leave of the wardship court to make an application for review of his or her capacity and discharge from wardship. Any other person making an application under Part 6 must seek the consent of the wardship court prior to making an application.

The proposed new subsections (3A) (3B) and (3C) address a gap in the current provisions of the Act. The amendments seek to ensure that the rights of wards are respected in relation to court proceedings where their capacity is reviewed. It provides that a ward of court may be assisted in the proceedings to review his or her capacity by a “court friend” or another suitable, willing and able person. As with the proposed amendment to section 36(8) (*Persons who may make applications under this Part*), the court must have regard to the known will and preferences of the ward before permitting a person other than a legal representative or court friend to assist. This will ensure equal treatment of wards and “relevant persons” in proceedings before the court in relation to capacity reviews.

The ward’s committee has been included as a person who can make an application to court for a capacity declaration under section 54(1) and is also included as a person who can assist the relevant person in court before a court friend is needed under section 54(3B).

Head 71 also provides for an amendment to section 103 (*Codes of practice*) to include committees under the code of practice for court friends.

Head 33 Amendment of section 55 of Act of 2015 ¹¹

Provide that:

Section 55 of the Act of 2015 is amended by the substitution of the following for subsections (4) and (5):

“(4) Where the wardship court makes a declaration pursuant to subsection (1)(b)(i) but—

(a) there is no suitable person to act as co-decision-maker for the ward, or

(b) a co-decision-making agreement in respect of the ward is not registered in accordance with Part 4 within a time period set down by the wardship court, the wardship court shall (subject to it allowing for any extension of the period set down by it)—

(i) as if it had made a declaration under subsection (1)(b)(ii), make such orders, including a decision-making representation order appointing a decision-making representative, and give such directions as it considers appropriate under Part 5 as if the wardship court were the court under Part 5,

(ii) discharge the ward from wardship, and

(iii) order that the property of the former ward be returned to him or her upon the appointment of a decision-making representative in respect of the former ward.

(5) Where the wardship court makes a declaration pursuant to subsection (1)(b)(ii), it shall—

(a) make such orders, including a decision-making representation order appointing a decision-making representative, and give such directions as it considers appropriate under Part 5 as if the wardship court were the court under Part 5,

(b) discharge the ward from wardship, and

(c) order that the property of the former ward be returned to him or her upon the appointment of a decision-making representative in respect of the former ward.

¹¹ The drafting of this amendment was approved by the previous Government for introduction at Dáil Report Stage of the lapsed Disability (Miscellaneous Provisions) Bill 2016.

(6) When considering the suitability of a person to be a decision-making representative for a former ward, the wardship court shall have regard to the following:

- (a) the known will and preferences of the former ward;
- (b) the desirability of preserving existing relationships within the family of the former ward;
- (c) the relationship (if any) between the former ward and the proposed representative;
- (d) the compatibility of the proposed representative and the former ward;
- (e) whether the proposed representative will be able to perform the functions to be vested in him or her;
- (f) any conflict of interest.

(7) Where the wardship court appoints a decision-making representative to make decisions on the former ward's property and affairs, it shall have regard to the following:

- (a) the size, nature and complexity of the former ward's financial affairs;
- (b) any professional expertise, qualification or experience required to manage the former ward's financial affairs;
- (c) the capability of the proposed representative to manage the {former} ward's property and affairs;
- (d) the financial expertise and support available to the proposed representative.

(8) Where the wardship court proposes to appoint a decision-making representative for a former ward but no suitable person is willing to act as such decision-making representative—

- (a) the court shall request the Director to nominate 2 or more persons from the panel established under section 101 for consideration by the court for such appointment, and
- (b) the Director shall comply with a request by the court under paragraph (a), and
- (c) the court may appoint, from amongst those nominees, a person to be a decision-making representative for the former ward for the purposes referred to in that paragraph.

(9) In appointing a decision-making representative, the wardship court shall ensure that the powers conferred on the decision-making representative are as limited in

scope and duration as is necessary in the circumstances having regard to the interests of the former ward.

(10) The wardship court may appoint one or more than one person as a decision-making representative for a former ward and may so appoint different persons in respect of different relevant decisions.

(11) The wardship court shall require the decision-making representative, or decision-making representatives if there is more than one, to sign a statement indicating that he or she—

- (a) understands and undertakes to act in accordance with the powers conferred and the duties imposed on him or her by the court, and
- (b) understands and undertakes to act in accordance with the guiding principles set out in section 8.

(12) A decision-making representation order appointing more than one person as a decision-making representative for a former ward in relation to the same relevant decisions shall make provision as to whether such persons are to act—

- (a) jointly,
- (b) jointly and severally, or
- (c) jointly as respects some relevant decisions and jointly and severally as respects other relevant decisions.

(13) Sections 39 to 44 and 45 to 47 shall apply to decision-making representatives appointed under this Part as they apply to decision-making representatives appointed under Part 5.

(14) Section 45 shall apply to a decision-making representation order made by the wardship court as it applies to a decision-making representation order made under Part 5.”.

Explanatory Note:

This Head amends section 55 (*Declarations following review and discharge from wardship*) of the Act of 2015 to clarify in new subsections 4(b)(ii) and 5(b) that when the wardship court makes a declaration as to the capacity of the ward following a review of his or her capacity (functional approach), the ward will be discharged from wardship once the appropriate support arrangement has been put in place. Subsections 4(a) and (b) also now refer to the “ward” instead of the “former ward” as the ward has not yet been discharged from wardship.

The Head seeks to ensure that there is full consistency with the provisions of section 37 (*Power of court to make declarations as to capacity, etc.*) and section 21 (*Application for registration of co-decision-making agreement*) in relation to time periods for the registration

of a co-decision-making agreement and that the wardship court does not shorten those time periods but rather the amending provision makes clear that the wardship court may extend those time periods. It is considered important that each ward be given the opportunity to have the benefit of the least restrictive arrangement being put in place i.e. a co-decision-making agreement rather than being subject to a decision-making representation order.

The Head also replicates the safeguards provided for under Part 5 (*Applications to court in respect of relevant persons and related matters*) in relation to the appointment of a decision-making representative and provides for decision-making representation orders made by the wardship court to be included on the Register to be established by the Director of the Decision Support Service. Subsections (6) to (12) are new to Part 6 (*Wards*) and for the most part replicate subsections (5) to (12) of section 38 (*Power of court to make orders and appoint decision-making representative, etc.*) in Part 5. Subsections (8),(13) and (14) have not been replicated.

DRAFT

Head 34 NEW SECTION 55A- Review of declaration as respects capacity¹²

Provide that:

The Act of 2015 is amended by the insertion of the following section after section 55:

“55A. Review of declaration as respects capacity – wards

(1) Where the wardship court makes a declaration pursuant to section 55(1)(b)(i) or section 55(1)(b)(ii), the wardship court shall make an order that the capacity of the previous ward be reviewed by the Circuit Court—

(a) subject to paragraph (b), not later than 12 months from the date on which the wardship court made the declaration,

(b) not later than 3 years from the date on which the wardship court made the declaration if the wardship court is satisfied that the previous ward is unlikely to recover his or her capacity.

(2) Section 49 shall apply to a review by the Circuit Court carried out in accordance with an order under subsection (1) as it applies to a review of a declaration made under section 37(1).”.

Explanatory Note:

This Head inserts a new section 55A (*Review of declaration as respects capacity*) into the Act to provide that following the making of a declaration in respect of the lack of capacity of a ward and the discharge of the ward from wardship, the wardship court shall make an order providing for a review of the person’s capacity by the Circuit Court within 12 months, or not later than 3 years if the wardship court is satisfied that the previous ward is unlikely to recover his or her capacity.

It had been intended that the review mechanism under Part 5 as provided for by section 49 (*Review of declaration as respects capacity*) would apply to declarations made under Part 6.

¹² The drafting of this amendment was approved by the previous Government for introduction at Dáil Report Stage of the lapsed Disability (Miscellaneous Provisions) Bill 2016.

However, section 49 only deals with the review of declarations made by the Circuit Court under section 37(1).

The new section seeks to ensure that once the Circuit Court reviews the declaration made by the wardship court, the automatic review of declarations by the Circuit Court in respect of capacity provided for under Part 5 of the Act will take effect, providing for a systematic review of declarations in respect of former wards. It provides parity and equal treatment of former wards and relevant persons.

DRAFT

Head 35 Deletion of section 57 of Act of 2015 ¹³

Provide that:

The Act of 2015 is amended by the deletion of section 57.

Explanatory Note:

The purpose of section 57 (*Director and wards who are adults*) of the Act was to enable the wardship court to transfer the supervision of existing adult wards to the Director of the Decision Support Service. It was not the intention to circumvent the review mechanism and discharge from wardship.

As it was not intended that the Director would manage the estates of relevant persons, except as a last resort for a short period while a suitable decision-making representative was appointed, it is difficult to see how this provision could operate in practice and it is proposed that section 57 be deleted.

Head 26 has also provided for the deletion of sections 43(3), (4) and (5) (*Scope of decision-making representation order relating to property and affairs*) which gave a property management role to the Director of the Decision Support Service (DSS). This role is not appropriate to the Director and is more suited to the decision-making representative (DMR). DMRs with financial and property management expertise will be available from the panel maintained by the DSS for the Court to draw from as necessary. DMRs will also be able to engage and procure appropriate specialists and services as appropriate and in line with any court order.

¹³ The drafting of this amendment was approved by the previous Government for introduction at Dáil Report Stage of the lapsed Disability (Miscellaneous Provisions) Bill 2016.

Head 36 Amendment of section 58 of Act of 2015

Provide that:

Section 58 of the Act of 2015 is amended by the insertion of the following definition before “trust corporation” –

“specified by the Director” means specified by the Director under section 79A;”

Explanatory Note:

The proposed amendment to section 58 (*Interpretation - Part 7*) of the Act of 2015 is related to and consequential to the proposed amendments to section 79 (*Regulations*) of the Act and the proposed new section 79A (*Matters to be specified by Director in relation to enduring powers of attorney*) to provide for specification by the Director of the Decision Support Service of forms.

Forms are currently required to be prescribed by the Minister but it is proposed to provide in this Bill that the Director may specify forms. Providing for forms relating to the Act to be specified by the Director is considered to be consistent with the provisions of the Mental Health Act 2001 (No. 25) which requires forms relating to that Act to be specified by the Mental Health Commission.

Similar and related amendments are contained in:

- Head 5 amending section 9 (*Definitions – Part 3*)
- Head 6 amending section 10 (*Decision-making assistance agreement*)
- Head 12 amending section 16 (*Definitions - Part 4*)
- Head 13 amending section 17 (*Co-decision-making agreement*)
- Head 16 amending to section 24 (*Objections to registration*)
- Head 17 amending section 27 (*Reports by co-decision-maker*)
- Head 18 amending section 28 (*Variation of co-decision-making agreement*)
- Head 21 amending section 31 (*Regulations*)
- Head 22 inserting a new section 31A (*Matters to be specified by Director in relation to co-decision-making agreements*);
- Head 38 amending section 59 (*Enduring power of attorney — general*)
- Head 50 amending section 73 (*Revocation and variation of enduring power*)
- Head 52 amending section 75 (*Reports by attorney*)
- Head 57 amending section 79 (*Regulations*) of the Act of 2015
- Head 58 inserting a new section 79A (*Matters to be specified by the Director in relation to enduring powers of attorney*).

Head 37 NEW SECTION 58A Trust Corporation

Provide that:

The Act of 2015 is amended by the insertion of a new section 58A (Trust corporation) after section 58.

“58A. Trust corporation

- (1) A trust corporation shall apply to the High Court before the donor loses his or her decision-making capacity for approval to act as such in order to take on the duties of attorney in an enduring power of attorney under this Act.
- (2) Representation shall not be granted to any person on behalf of a trust corporation.
- (3) An officer, authorised for the purpose by a Board resolution, by a trust corporation or the directors or governing body thereof, may, on behalf of the corporation, swear an affidavit, give security and do any other act or thing which the court or an enduring power of attorney may require, and the act of an officer, so authorised, shall be binding on the corporation
- (4) Each director of a trust corporation shall be liable for offences under this Act and shall be liable for non-compliance with statutory requirements
- (5) Following approval by the High Court, and before registration of the enduring power of attorney, the Director shall, in addition to all requirements for enduring power of attorney, specify
 - (a) the rules in relation to the signature of a document by an authorised person on behalf of a trust corporation
 - (b) the circumstances and the certified documentation required prior to the approval by the Director of a change of authorised person
 - (c) any other relevant issues.
- (6) The age criterion in relation to an attorney is not applicable in relation to a trust corporation.

(7) The Minister shall prescribe by regulation the fees that may be charged by a trust corporation.”

Explanatory Note

This Head inserts a new section 58A (*Trust corporation*) to provide for additional safeguards to ensure a trust corporation can become an attorney in an EPA. These provisions provide for the following:

- The approval of a trust corporation to be designated as such by the High Court for the purpose of fulfilling the role of attorney for an Enduring Power of Attorney (EPA) under this Act. This is in line with section 30 of the Succession Act 1965 (No. 27) which allows trust corporations to become executors of wills only once they have been approved by the High Court. The same High Court approval should be in place for trust corporations wishing to act as attorneys under this Act. The application must be made before the donor loses his or her decision-making capacity.
- An individual is not named as the attorney but rather the trust corporation is the attorney. In this way, the trust corporation is more flexible and can achieve continuity, should an individual attorney retire or die.
- The actions of any individual who acts on behalf of the trust corporation are binding on the trust corporation. An authorised person is defined as the person or persons appointed by a board resolution.
- Each director of the trust corporation is liable for offences under this Act and is also liable for non-compliance with statutory requirements.
- The Director of the DSS shall specify the rules in relation to authorised signatures of the corporation, changes of authorised personnel, and any other related matters.
- Subsection (7) provides that the Minister shall make regulations regarding fees for trust corporations.

The provisions in this Head are in addition to the general EPA rules that all attorneys including trust corporations must follow, namely that:

- The EPA and the instrument creating it are in accordance with the Act;

- The attorney is a suitable person able to perform the functions of attorney as specified in the EPA;
- The attorney is eligible for appointment and not disqualified, has no convictions for fraud or dishonesty and no offences committed against the person intending to appoint him or her;
- Objections may be made to the registration;
- An attorney for property and affairs must within 3 months of the registration submit to the Director a schedule of the donor's assets and liabilities and a projected statement of the donor's income and expenditure; keep proper accounts and records; make available for inspection any records or accounts to the Director. He or she must also prepare a report for the Director at intervals of not less than twelve months to include details of all costs, expenses and remuneration paid to and claimed by the attorney in the relevant period together with such other matters as are prescribed.

Consequential amendments are required in relation to Head 39 amending section 60(1)(e) (*Content of instrument creating an enduring power of attorney*) of the Act of 2015 to reflect that a trust corporation's undertaking is subject to court approval and Head 42 amending section 65(1) (*persons who are not eligible to be attorneys*) of the Act of 2015 to render ineligible a trust corporation who has not been approved in advance of registration by the High Court to so act.

Head 38 Amendment of section 59 of Act of 2015¹⁴

Provide that:

Section 59 of the Act of 2015 is amended—

(a) in subsection (1) by the substitution of the following for subsection (1)(a)

general authority to act on the donor’s behalf in relation to all or a specified part of the donor’s personal welfare or property and affairs, or both; or

(b) in subsection (2), by the substitution of “this Part, regulations made under section 79 and specifications made by the Director under section 79A” for “this Part and regulations made under section 79”,

(c) in subsection (3), by the insertion of “or disclaims the enduring power of attorney” after “acting as attorney”.

(d) in subsection (4), by the insertion of “the Director has been so notified, and” after “subject of the power, and”

(e) by the insertion of the following after subsection (6)

“(7) (a) Where an enduring power of attorney confers authority in relation to personal welfare, the power does not authorise an attorney to consent to or refuse treatment.

(b) To the extent that an enduring power of attorney includes a relevant decision specified in paragraph (a), the power shall be null and void.”.

Explanatory Note:

This Head amends section 59 (*Enduring power of attorney — general*) of the Act of 2015.

The proposed amendment in subsection (1)(a) is to provide for the inclusion of 'personal welfare' in the text.

The proposed amendment in subsection (2) is related to and consequential on the proposed amendment of section 79 (*Regulations*) and the proposed new section 79A (*Matters to be specified by Director in relation to enduring powers of attorney*) to provide for specification by the Director of the Decision Support Service of forms. Forms are currently required to be

¹⁴ The drafting of this amendment (other than the proposed new subsection (7)) was approved by the previous Government for introduction at Dáil Report Stage of the lapsed Disability (Miscellaneous Provisions) Bill 2016.

prescribed by the Minister in Regulations but it is proposed instead to allow the Director to specify forms. Providing for forms relating to the Act to be specified by the Director is considered to be consistent with the provisions of the Mental Health Act 2001 (No. 25) which requires forms relating to that Act to be specified by the Mental Health Commission.

Similar and related amendments are contained in:

- Head 5 amending section 9 (*Definitions – Part 3*)
- Head 6 amending section 10 (*Decision-making assistance agreement*)
- Head 12 amending section 16 (*Definitions - Part 4*)
- Head 13 amending section 17 (*Co-decision-making agreement*)
- Head 16 amending to section 24 (*Objections to registration*)
- Head 17 amending section 27 (*Reports by co-decision-maker*)
- Head 18 amending section 28 (*Variation of co-decision-making agreement*)
- Head 21 amending section 31 (*Regulations*)
- Head 22 inserting a new section 31A (*Matters to be specified by Director in relation to co-decision-making agreements*);
- Head 36 amending section 58 (*Interpretation - Part 7*)
- Head 50 amending section 73 (*Revocation and variation of enduring power*)
- Head 52 amending section 75 (*Reports by attorney*)
- Head 57 amending section 79 (*Regulations*) of the Act of 2015
- Head 58 inserting a new section 79A (*Matters to be specified by the Director in relation to enduring powers of attorney*).

The purpose of the amendment in subsection (3) is to allow the donor of an enduring power of attorney to appoint a substitute attorney to act in a case where the attorney disclaims the enduring power. Currently in the 2015 Act a substitute attorney may only be appointed when the attorney dies, is unable to act, or is disqualified from acting as an attorney. The situation where an attorney disclaims the enduring power was not provided for in the Act. This amendment addresses that omission.

The proposed amendment to subsection (4) is for the purpose of providing for the notification of the Director prior to the entering into force of the enduring power of attorney. This relates to the policy change to EPAs which now require a two-step process of engagement with the DSS i.e. registration at execution and notification when the donor loses capacity and the EPA enters into force. The EPA, therefore, does not enter into force until the donor loses capacity and the Director has been notified.

A new subsection (6) refers to the policy decision to exclude treatment decisions from EPAs. The definition of “treatment” is proposed to be moved from section 82 (*Definitions – Part 8*) to section 2 (*Interpretation – general*) as it is now referred to in the proposed amendment to section 59 of Part 7 and therefore needs to be relevant to the entire Act and not just Part 8. The policy intent is to exclude treatment decisions from EPAs and include treatment decisions only in AHDs. This Head inserts a new subsection (7) to provide as follows:

“(7)(a) Where an enduring power of attorney confers authority in relation to personal welfare, the power does not authorise an attorney to consent to or refuse treatment.

“(b) To the extent that an enduring power of attorney includes a relevant decision specified in paragraph (a), the power shall be null and void.”.

This replaces section 62(5) and section 62(6) (*Scope of Authority – personal welfare decisions*) which are proposed to be deleted in Head 41. The subsections proposed to be deleted are as follows:

“(5) A donor shall not, in an enduring power of attorney, include a relevant decision-

(a) relating to refusal of life-sustaining treatment, or

(b) which is the subject of an advanced healthcare directive made by him or her.

“(6) To the extent that an enduring power of attorney includes a relevant decision specified in subsection (5), the power shall be null and void.”

Head 60 amends section 82 to remove the definition of treatment from Part 8 as it is now proposed to be included in section 2 of Part 1.

DRAFT

Head 39 Amendment of section 60 of Act of 2015 (Content of instrument creating an enduring power of attorney)

Provide that

Section 60 is amended-

- (a) in subsection (1)(a)(iii) by the insertion of “and post registration up to the point the Attorney notifies the Director that the donor lacks capacity in relation to one or more of the relevant decisions which are the subject of the power;” after “prior to its registration”,
- (b) In subsection (1)(b)(ii) by the insertion of “and post registration up to the point the Attorney notifies the Director that the donor lacks capacity in relation to one or more of the relevant decisions which are the subject of the power,” after “prior to its registration”,
- (c) In subsection (1)(e)(iv) by the removal of the word “and” after “under section 75”,
- (d) In subsection 1(e)(v) by the insertion of “and in relation to notifying the Director when the donor lacks capacity in relation to one or more of the relevant decisions which are the subject of the power, and” after “registration of the power” and
- (e) In subsection 1(e) by the insertion after subsection 1(e)(v) of “1(e)(vi) in addition if a trust corporation, understands that a trust corporation’s undertaking is subject to court approval.

Explanatory Note:

This is one of a number of Heads the purpose of which is to provide for the proposed change in the process of registering an Enduring Power of Attorney (EPA). Under the Act of 2015 an EPA may be registered when a donor loses capacity. The new process requires that an EPA is to be registered at the stage of execution of the EPA while the donor has capacity and is in a position to discuss issues with the Decision Support Service (DSS). The second step in the proposed new process provides for the attorney to notify the DSS at the stage where the donor loses capacity and at that stage the EPA is entered into force.

The proposed introduction of a two-stage process will require a number of sections in the Act of 2015 to be amended including

- Head 8 amending section 13 (*Disqualification as decision-making assistant*)
- Head 14 amending section 20 (*Nullity*)
- Head 24 amending section 40 (*Disqualification as decision-making representative*)

- Head 40 amending section 61 (*Notice of execution of an enduring power of attorney*)
- Head 43 amending section 66 (*Disqualification of attorney*)
- Head 44 amending section 67 (*Function of court prior to registration*)
- Head 45 amending section 68 (*Application for registration of instrument creating enduring power*)
- Head 46 to amend section 69 (*Registration of an instrument creating an enduring power of attorney*)
- Head 47 deleting section 70 (*Effect and proof of registration*)
- Head 48 amending section 71 (*Objections to registration*)
- Head 49 amending section 72 (*Register of Enduring Powers*)
- Head 50 amending section 73 (*Revocation and variation of enduring power*)
- Head 51 amending section 74 (*Disclaimer by attorney*)
- Head 52 amending section 75 (*Reports by attorney*)
- Head 54 amending section 77 (*Applications to court*)
- Head 56 inserting a new section 78A (*Notification to Director that donor lacks capacity in relation to one or more relevant decisions that are subject of enduring power of attorney*)
- Head 58 inserting a new section 79A (*Matters to be specified by the Director in relation to enduring powers of attorney*)
- Head 59 amending section 80 (*Offences in relation to enduring powers of attorney*) of the Act of 2015.

Paragraphs (a), (b) and (d) of this Head propose amendments to section 60 (*Content of instrument creating an enduring power of attorney*) of the Act of 2015 to provide that a donor may vary or revoke an EPA following registration up until the time of notification to the DSS. These changes are necessary as the donor has capacity until the second stage (notification) of the process.

The proposed amendment in paragraph (e) is included to reflect that a trust corporation's undertaking is subject to court approval.

The addition of the amendment in paragraph (e) necessitates an amendment in paragraph (c) to remove the word "and".

Related trust corporation amendments are in Head 37 inserting a new section 58A (*Trust Corporation*) and Head 42 amending subsection (1) of section 65 (*Persons who are not eligible to be attorneys*) of the Act of 2015.

Head 40 Deletion of section 61 of Act of 2015

Provide that:

The Act of 2015 is amended by the deletion of section 61.

Explanatory Note:

Section 61 (*Notice of execution of an enduring power of attorney*) of the Act of 2015 provides for the steps involved in notifying persons of the execution of an Enduring Power of Attorney. This provision is no longer required as the proposed new two-step EPA process involves notice of registration and notice of notification. It is considered unnecessary to also provide for a notice of execution. This Head provides the deletion of section 61. The provisions of section 61 have been moved (Head 56) to a new section 78A (*Notification to Director that donor lacks capacity in relation to one or more relevant decisions that are subject of enduring power of attorney*) for the purposes of notification provisions in that section.

The proposed introduction of a two-stage EPA process will require the amendment of a number of sections in the Act of 2015 including

- Head 8 amending section 13 (*Disqualification as decision-making assistant*)
- Head 14 amending section 20 (*Nullity*)
- Head 24 amending section 40 (*Disqualification as decision-making representative*)
- Head 39 amending section 60 (*Content of instrument creating an enduring power of attorney*)
- Head 43 amending section 66 (*Disqualification of attorney*)
- Head 44 amending section 67 (*Function of court prior to registration*)
- Head 45 amending section 68 (*Application for registration of instrument creating enduring power*)
- Head 46 to amend section 69 (*Registration of an instrument creating an enduring power of attorney*)
- Head 47 deleting section 70 (*Effect and proof of registration*)
- Head 48 amending section 71 (*Objections to registration*)
- Head 49 amending section 72 (*Register of Enduring Powers*)
- Head 50 amending section 73 (*Revocation and variation of enduring power*)
- Head 51 amending section 74 (*Disclaimer by attorney*)
- Head 52 amending section 75 (*Reports by attorney*)
- Head 54 amending section 77 (*Applications to court*)
- Head 56 inserting a new section 78A (*Notification to Director that donor lacks capacity in relation to one or more relevant decisions that are subject of enduring power of attorney*)

- Head 58 inserting a new section 79A (*Matters to be specified by the Director in relation to enduring powers of attorney*)
- Head 59 amending section 80 (*Offences in relation to enduring powers of attorney*) of the Act of 2015.

DRAFT

Head 41 Deletion of section 62 of Act of 2015

Provide that

The Act of 2015 is amended by the deletion of section 62.

Explanatory Note

Section 62 (*Scope of Authority – personal welfare decisions*) of the Act of 2015 contains provisions relating to restraint of a relevant person. Significant concerns had been expressed by stakeholders at the inclusion of these provisions in the Act of 2015. Following further policy consideration it is proposed to remove provisions which related to the use of restraint by decision supporters in private settings. This does not encompass the use of restraint in institutional settings which will continue to be governed by relevant legislation and guidelines.

Subsections (1), (2), (3) and (4) of section 62 are proposed to be deleted as they relate to restraint which is proposed to be removed from the Act. A related amendment is included in Head 27 amending section 44 (*Restrictions on decision-making representatives*) of the Act of 2015.

The deletion of subsections (5) and (6) is consequential to the proposed amendment in Head 3 to move the definition of “treatment” from section 82 (*Definitions – Part 8*) to section 2 (*Interpretation – general*). Head 60 amends section 82 to remove the definition of treatment from Part 8. This move is required as treatment is now referred to in an amendment to Part 7 and therefore needs to be relevant to the entire Act and not just Part 8. The policy intent is to exclude treatment decisions from EPAs and include treatment decisions only in AHDs. Head 38 inserts a new subsection (7) into section 59 to replace subsections (5) and (6) of section 62 which are proposed to be deleted in this Head. The new section 59(7) provides as follows:

“(7)(a) Where an enduring power of attorney confers authority in relation to personal welfare, the power does not authorise an attorney to consent to or refuse treatment.

(b) To the extent that an enduring power of attorney includes a relevant decision specified in paragraph (a), the power shall be null and void.”

Sections 61(5) and 61(6) which are proposed for deletion in this Head provide as follows:

“(5) A donor shall not, in an enduring power of attorney, include a relevant decision-

(a) relating to refusal of life-sustaining treatment, or

(b) which is the subject of an advanced healthcare directive made by him or her.

(6) To the extent that an enduring power of attorney includes a relevant decision specified in subsection (5), the power shall be null and void.”

Head 42 Amendment of section 65 of Act of 2015

Provide that

Section 65 of the Act of 2015 is amended in subsection (1)

(a) by the substitution of the following for paragraphs (a) and (b)

- (a) has been convicted of an offence in relation to a person or property of the person who intends to appoint an attorney or the person or property of a child of that person
- (b) has been the subject of a safety or barring order in relation to the person who intends to appoint an attorney or a child of that person.

(b) in paragraph (f) by the deletion of the word “or” after “the intending donor,”

(c) in paragraph (g) by the substitution of “or 145, or” for “or 145.”

(d) by the insertion of the following after paragraph (g)

“(h) is a trust corporation which has not been approved in advance of registration by the High Court to so act.”.

Explanatory Note:

The purpose of paragraph (a) of this Head is to amend section 65 (*Persons who are not eligible to be attorneys*) to provide for consistency in the Act of 2015 relating to grounds for non-eligibility for appointment as an attorney, and providing that the same grounds of non-eligibility apply to an attorney as apply to other decision supporters.

The aim is to ensure that a relevant person is protected from an attorney who might perpetrate coercive control or financial abuse of him or her (such as a person who has been or is the subject of a safety or barring order against the relevant person or that person’s child).

The Act of 2015 already provides that “persons who have been convicted of an offence in relation to the person or property of the child” of the appointer/relevant person/directive-maker, as the case may be, are not eligible to be a co-decision maker (section 18(1)(a) and (b)), decision-making representative (section 39(1)(a) and (b)), or designated healthcare representative (section 87(20)(b) and (c)).

A related amendment is included in Head 7 amending section 11 (*Persons who are not eligible to be decision-making assistants*) for consistency to ensure that those excluded from undertaking other decision supporter roles are also excluded from becoming decision-making assistants.

The purpose of paragraph (b) of this Head is to amend section 65 to render ineligible a trust corporation which has not been approved in advance of registration by the High Court to so act.

The amendments in paragraphs (c) and (d) are technical amendments and are consequential to the proposed amendment in paragraph (b).

Related trust corporation amendments are in Head 37 inserting a new section 58A (*Trust Corporation*) and in Head 39 amending section 60(1)(e) (*Content of instrument creating an enduring power of attorney*) of the Act of 2015.

DRAFT

Head 43 Amendment of section 66 of Act of 2015

Provide that:

Section 66(4)(h)(iii) of the Act of 2015 is amended by the insertion of the words “entered into force in respect of himself or herself” after the words “enduring power of attorney”.

Explanatory Note:

This Head amends section 66 (*Disqualification of attorney*) of the Act of 2015 removing a reference to the Enduring Power of Attorney (EPA) completed under the 2015 Act being registered and inserting a reference to that type of EPA entering into force in line with the proposed new procedure for giving effect to EPAs.

Under the Act of 2015 an EPA may be registered when a donor loses capacity. The new process requires that an EPA is to be registered at the stage of execution of the EPA while the donor has capacity and is in a position to discuss issues with the Decision Support Service (DSS). The second step in the proposed new process provides for the attorney to notify the DSS at the stage where the donor loses capacity and at that stage the EPA is entered into force.

Section 66 sets out the circumstances whereby an attorney shall be disqualified from acting as an attorney. One of these circumstances is where an attorney has an EPA in force, in respect of himself or herself, due to his or her own lack of capacity. When this occurs an attorney will be disqualified from acting in that role. Under the Act of 2015 an attorney is disqualified from acting in that role from the date on which his or her EPA was registered. Under the proposed new scheme the relevant date for disqualification is the date of entry into force of an EPA which is at the second stage (entry into force) of the two step process i.e. when the Director is notified of the decision-making representative’s EPA.

The proposed introduction of a two-stage EPA process will require the amendment of a number of other sections in the Act of 2015 including

- Head 8 amending section 13 (*Disqualification as decision-making assistant*)
- Head 14 amending section 20 (*Nullity*)
- Head 24 amending section 40 (*Disqualification as decision-making representative*)
- Head 39 amending section 60 (*Content of instrument creating an enduring power of attorney*)
- Head 40 amending section 61 (*Notice of execution of an enduring power of attorney*)
- Head 44 amending section 67 (*Function of court prior to registration*)
- Head 45 amending section 68 (*Application for registration of instrument creating enduring power*)

- Head 46 to amend section 69 (*Registration of an instrument creating an enduring power of attorney*)
- Head 47 deleting section 70 (*Effect and proof of registration*)
- Head 48 amending section 71 (*Objections to registration*)
- Head 49 amending section 72 (*Register of Enduring Powers*)
- Head 50 amending section 73 (*Revocation and variation of enduring power*)
- Head 51 amending section 74 (*Disclaimer by attorney*)
- Head 52 amending section 75 (*Reports by attorney*)
- Head 54 amending section 77 (*Applications to court*)
- Head 56 inserting a new section 78A (*Notification to Director that donor lacks capacity in relation to one or more relevant decisions that are subject of enduring power of attorney*)
- Head 58 inserting a new section 79A (*Matters to be specified by the Director in relation to enduring powers of attorney*)
- Head 59 amending section 80 (*Offences in relation to enduring powers of attorney*) of the Act of 2015.

DRAFT

Head 44 Amendment of section 67 of Act of 2015

Provide that

Section 67 of the Act of 2015 is amended by the substitution of the following for section 67

“Function of court prior to notification

67. On application to it by any interested party, the court may, where it has reason to believe that the donor of an enduring power of attorney lacks capacity in relation to one or more relevant decisions, exercise any power which would become exercisable under section 77 (3) on the notification to the Director that the donor lacks capacity in relation to one or more of the relevant decisions which are the subject of the power and may do so whether or not the attorney concerned has notified the Director that the donor lacks capacity in relation to one or more of the relevant decisions which are the subject of the power.”

Explanatory Note:

This is one of a number of Heads the purpose of which is to provide for the proposed change in the process of registering an enduring power of attorney (EPA). Under the Act of 2015 an Enduring Power of Attorney (EPA) may be registered when a donor loses capacity. The new process requires that an EPA is to be registered at the stage of execution of the EPA while the donor has capacity and is in a position to discuss issues with the DSS. The second step in the proposed new process provides for the attorney to notify the DSS at the stage where the donor loses capacity and at that stage the EPA is entered into force.

The proposed introduction of a two-stage EPA process will require the amendment of a number of other sections in the Act of 2015 including

- Head 8 amending section 13 (*Disqualification as decision-making assistant*)
- Head 14 amending section 20 (*Nullity*)
- Head 24 amending section 40 (*Disqualification as decision-making representative*)
- Head 39 amending section 60 (*Content of instrument creating an enduring power of attorney*)
- Head 40 amending section 61 (*Notice of execution of an enduring power of attorney*)
- Head 43 amending section 66 (*Disqualification of attorney*)
- Head 45 amending section 68 (*Application for registration of instrument creating enduring power*)

- Head 46 to amend section 69 (*Registration of an instrument creating an enduring power of attorney*)
- Head 47 deleting section 70 (*Effect and proof of registration*)
- Head 48 amending section 71 (*Objections to registration*)
- Head 49 amending section 72 (*Register of Enduring Powers*)
- Head 50 amending section 73 (*Revocation and variation of enduring power*)
- Head 51 amending section 74 (*Disclaimer by attorney*)
- Head 52 amending section 75 (*Reports by attorney*)
- Head 54 amending section 77 (*Applications to court*)
- Head 56 inserting a new section 78A (*Notification to Director that donor lacks capacity in relation to one or more relevant decisions that are subject of enduring power of attorney*)
- Head 58 inserting a new section 79A (*Matters to be specified by the Director in relation to enduring powers of attorney*)
- Head 59 amending section 80 (*Offences in relation to enduring powers of attorney*) of the Act of 2015.

This proposed amendment to section 67 (*Function of court prior to registration*) of the Act of 2015 provides that the court may exercise any power which would become exercisable under section 77(3) (*Applications to court*) prior to the notification stage (rather than prior to the registration stage) of the process. The current wording provides for the court to act if the donor has lost capacity but the EPA has not been registered. The amendment provides for the court to act if the donor has lost capacity but the EPA has not been notified, which, in the new two-step process, is when the EPA enters into force.

Head 45 Amendment of section 68 of Act of 2015¹⁵

Provide that:

Section 68 of the Act of 2015 is amended—

- (a) by the substitution of the following for subsection (1)

“(1) The donor shall, within 5 weeks following execution of an instrument and receipt of all completed supporting documentation, make an application to the Director, in compliance with this Part, regulations made under section 79 and specifications made by the Director under section 79A, to register the instrument creating the enduring power of attorney.”

- (aa) by the insertion in subsection (2) of

“as shall be specified by the Director under section 79A” after the words “in such form”,

- (b) by the insertion of the following subsections after subsection (3):

“(3A) Subsection (3)(b) shall not apply to the spouse or civil partner of the donor where—

(a) a decree of judicial separation is granted to either spouse by a court in the State or any decree is so granted by a court outside the State and is recognised in the State as having like effect,

(b) a written agreement to separate is entered into between the spouses,

(c) subject to section 2(2), the spouses separate and cease to cohabit for a continuous period of 12 months,

(d) a written agreement to separate is entered into between the civil partners, or

(e) subject to section 2(2), the civil partners separate and cease to cohabit for a continuous period of 12 months.

(3B) Subsection (3)(c) shall not apply where, subject to section 2(2), the cohabitants separate and cease to cohabit for a continuous period of 12 months.”,

¹⁵ The drafting of this amendment was approved by the previous Government for introduction at Dáil Report Stage of the lapsed Disability (Miscellaneous Provisions) Bill 2016. Further proposed amendments are also included

- (c) by the deletion of subsection (5)
- (d) by the deletion of subsection (6)
- (da) by the deletion of subsection (7)(b)
- (e) in subsection (7)(c), by the substitution of “donor” for “appointer”,
- (f) by the insertion of the following subsection after subsection (8):

“(9) Where there is more than one attorney appointed under an enduring power of attorney, in the case of the death, lack of capacity or disqualification of, or disclaimer of the enduring power of attorney by, all such attorneys except one of them, the remaining attorney may apply to register the instrument unless the enduring power expressly provides to the contrary.”.

Explanatory Note:

The purpose of this Head is to amend section 68 (*Application for registration of instrument creating enduring power*) of the Act of 2015.

Subsection (1) is proposed to be substituted with a new subsection (1) to include a timeframe for the EPA to be registered after execution. The 2015 Act provided that registration take place “as soon as is practicable” whereas the amendment provides for a time period of “within 5 weeks” and “receipt of all completed supporting documentation” to allow for the fact that there could be a delay receiving statements from a medical professional for example. The period of five weeks is in line with the length of time given to register a co-decision-making agreement under section 21(2).

The previously approved amendment is proposed to be further amended to provide that it is the donor who will register the EPA as they still have capacity at registration in the new two-step process. It is also proposed to provide in the new subsection (1) and in the amendment to subsection (2) that the Director may specify forms under section 79A (*Matters to be specified by Director in relation to enduring powers of attorney*)

The proposed new subsections (3A) and (3B) provide that the notice requirements relating to registration of an enduring power of attorney in section 68 will not apply in relation to spouses, civil partners and cohabitants whose relationships are no longer subsisting.

Currently the 2015 Act requires the relevant person to notify his or her spouse, civil partner or cohabitant when he or she applies to register an EPA and to also provide him or her with the EPA. He or she can then submit an objection to the registration of the instrument to the Director. This is not appropriate for spouses, civil partners or cohabitants who are separated or have not lived together for 12 months. Similar amendments are in Head 15 amending section 21 in relation to the notice requirements for registering a co-decision agreement and in Head 23 amending section 36 in relation to notice provisions for making an application to court under Part 5.

The deletion of subsection (5) is proposed as it is no longer relevant to the registration step in the two-step EPA process. Subsection 5 allowed the attorney to act under the EPA while the application to register it was pending. This is no longer relevant as the donor still has capacity when the EPA is registered.

The deletion of subsection (6) is proposed as it is no longer relevant to the registration step in the two-step EPA process. Subsection (6) required the attorney to report to the Director on any actions he or she took under subsection (5). This is no longer relevant as the attorney will no longer be taking actions under subsection (5).

The deletion of subsection (7)(b) is proposed as it required the attorney to provide at registration a statement from a medical practitioner and another healthcare professional that in their opinion the donor lacks capacity in relation to one or more relevant decisions which are the subject of the EPA. Statements that the donor lacks capacity are no longer relevant at registration as the donor has capacity. This provision is instead included at notification stage in subsection (3)(a) in the proposed new section 78A (*Notification to Director that donor lacks capacity in relation to one or more relevant decisions that are subject of enduring power of attorney*) (Head 56).

The proposed introduction of a two-stage EPA process will require the amendment of a number of other sections in the Act of 2015 including

- Head 8 amending section 13 (*Disqualification as decision-making assistant*)
- Head 14 amending section 20 (*Nullity*)
- Head 24 amending section 40 (*Disqualification as decision-making representative*)
- Head 39 amending section 60 (*Content of instrument creating an enduring power of attorney*)
- Head 40 amending section 61 (*Notice of execution of an enduring power of attorney*)
- Head 43 amending section 66 (*Disqualification of attorney*)
- Head 44 amending section 67 (*Function of court prior to registration*)
- Head 46 to amend section 69 (*Registration of an instrument creating an enduring power of attorney*)
- Head 47 deleting section 70 (*Effect and proof of registration*)
- Head 48 amending section 71 (*Objections to registration*)
- Head 49 amending section 72 (*Register of Enduring Powers*)
- Head 50 amending section 73 (*Revocation and variation of enduring power*)
- Head 51 amending section 74 (*Disclaimer by attorney*)
- Head 52 amending section 75 (*Reports by attorney*)
- Head 54 amending section 77 (*Applications to court*)
- Head 56 inserting new section 78A (*Notification to Director that donor lacks capacity in relation to one or more relevant decisions that are subject of enduring power of attorney*)
- Head 58 inserting a new section 79A (*Matters to be specified by the Director in relation to enduring powers of attorney*)

- Head 59 amending section 80 (*Offences in relation to enduring powers of attorney*) of the Act of 2015.

The proposed amendment to subsection (7)(c) is to replace a reference to an “appointer with a reference to a ‘donor’ as the relevant person is referred to as a donor when they are creating an EPA.

The proposed new subsection (9) provides that a single remaining attorney may apply to register the enduring power of attorney in a case where more than one attorney was appointed but where the other attorney or attorneys appointed have died, lack capacity, are disqualified or have disclaimed the enduring power of attorney. It should be noted that this may not happen if the EPA expressly provides against it. Where a donor wishes to have more than one attorney at all times, this should be clearly set out in the EPA and provision made for a successor to be appointed in the event that one of the attorneys dies, lacks capacity, is disqualified or disclaims the EPA. A similar amendment is included in Head 51 amending section 74 (*Disclaimer by attorney*).

DRAFT

Head 46 Amendment of section 69 of Act of 2015

Provide that

Section 69 of the Act of 2015 is amended –

(a) by the insertion of the following subsection after subsection (1)

“(1A) Where the instrument creating the enduring power of attorney differs in an immaterial respect from the form specified under section 79A, the Director may, notwithstanding such difference, treat the enduring power of attorney and the instrument creating it as being in accordance with sections 59 and 60, if he or she thinks it appropriate to do so.

(1B) Notwithstanding that notice requirements under section 68(3) for registering the enduring power of attorney have not been complied with, the Director may, if satisfied that all reasonable efforts have been made, without success, to satisfy the notice requirement under section 68(3), make an application to Court to waive the notice requirements in order to register the agreement”

(b) by the deletion of subsection (7)

and

(c) by the deletion of subsection (8)

Explanatory Note:

The purpose of this Head is to amend section 69 (*Registration of an instrument creating an enduring power of attorney*) of the Act of 2015 to give the Director of the Decision Support Service (DSS) the discretion to register an enduring power of attorney even if the instrument creating the power differs in an immaterial respect from the form provided for under section 79A (*Matters to be specified by Director in relation to enduring powers of attorney*).

It draws from section 10(5)(a) of the Powers of Attorney Act 1996 which provides “Where an instrument differs in an immaterial respect in form or mode of expression from the form prescribed by regulations under section 5(2)(a) the instrument shall be treated as sufficient in point of form and expression.”. This provision is currently used by the Registrar of the Office of Wards of Court in circumstances where he or she is satisfied that an error in the instrument creating an enduring power is immaterial, either because it was a minor error in itself or where he or she has received further documentation or evidence that the error was corrected or is not material. The provision under the 1996 Act allows the Registrar to register the enduring power of attorney without reverting to the court for its determination on the validity of the instrument creating the enduring power. The proposed provision will provide the Director of the DSS a similar discretion.

The insertion of new subsection (1B) also provides the Director with recourse to the Court in order to register the agreement if the notice requirements cannot be fulfilled through no fault of the donor.

This Head provides for the deletion of subsections (7) and (8) in section 69. It is instead proposed to insert these provisions into the new section 78A (*Notification to Director that donor lacks capacity in relation to one or more relevant decisions that are subject of enduring power of attorney*). As the EPA no longer comes into force at registration but, instead happens at the notification stage of the new two-step process, the issuing of an authenticated copy is more relevant to the notification stage when the EPA is in force and its contents are being relied upon. It is therefore proposed to move the provisions of subsections (7) and (8) to section 78A.

The proposed introduction of a two-stage EPA process will require the amendment of a number of other sections in the Act of 2015 including

- Head 8 amending section 13 (*Disqualification as decision-making assistant*)
- Head 14 amending section 20 (*Nullity*)
- Head 24 amending section 40 (*Disqualification as decision-making representative*)
- Head 39 amending section 60 (*Content of instrument creating an enduring power of attorney*)
- Head 40 amending section 61 (*Notice of execution of an enduring power of attorney*)
- Head 43 amending section 66 (*Disqualification of attorney*)
- Head 44 amending section 67 (*Function of court prior to registration*)
- Head 45 amending section 68 (*Application for registration of instrument creating enduring power*)
- Head 47 deleting section 70 (*Effect and proof of registration*)
- Head 48 amending section 71 (*Objections to registration*)
- Head 49 amending section 72 (*Register of Enduring Powers*)
- Head 50 amending section 73 (*Revocation and variation of enduring power*)
- Head 51 amending section 74 (*Disclaimer by attorney*)
- Head 52 amending section 75 (*Reports by attorney*)
- Head 54 amending section 77 (*Applications to court*)
- Head 56 inserting a new section 78A (*Notification to Director that donor lacks capacity in relation to one or more relevant decisions that are subject of enduring power of attorney*)
- Head 58 inserting a new section 79A (*Matters to be specified by the Director in relation to enduring powers of attorney*)
- Head 59 amending section 80 (*Offences in relation to enduring powers of attorney*) of the Act of 2015.

Head 47 Deletion of section 70 of Act of 2015

Provide that

The Act of 2015 is amended by the deletion of section 70.

Explanatory Note:

The Bill provides for a change in the process of registering an Enduring Power of Attorney (EPA). Currently the process involves registering the EPA when the donor loses capacity. The proposed new process requires that the EPA be registered while the donor has capacity and is in a position to discuss the EPA with DSS. The second stage is where the attorney notifies the DSS that the donor has lost capacity and at that stage the EPA is activated.

This change in procedure necessitates amendments to a number of sections in Part 7 (Enduring Powers of Attorney) of the Bill to provide for the new process.

This Head provides for the deletion of section 70 (*Effect and proof of registration*) of the Act of 2015 which currently provides for the effect and proof of registration of an instrument creating an enduring power of attorney. This is no longer required because of the proposed new two stage process for EPA registration and notification. The actions currently provided for under section 70 will now be provided for at the notification stage (see Head 56).

The proposed introduction of a two-stage EPA process will require the amendment of a number of other sections in the Act of 2015 including

- Head 8 amending section 13 (*Disqualification as decision-making assistant*)
- Head 14 amending section 20 (*Nullity*)
- Head 24 amending section 40 (*Disqualification as decision-making representative*)
- Head 39 amending section 60 (*Content of instrument creating an enduring power of attorney*)
- Head 40 amending section 61 (*Notice of execution of an enduring power of attorney*)
- Head 43 amending section 66 (*Disqualification of attorney*)
- Head 44 amending section 67 (*Function of court prior to registration*)
- Head 45 amending section 68 (*Application for registration of instrument creating enduring power*)
- Head 46 to amend section 69 (*Registration of an instrument creating an enduring power of attorney*)
- Head 48 amending section 71 (*Objections to registration*)
- Head 49 amending section 72 (*Register of Enduring Powers*)
- Head 50 amending section 73 (*Revocation and variation of enduring power*)
- Head 51 amending section 74 (*Disclaimer by attorney*)

- Head 52 amending section 75 (*Reports by attorney*)
- Head 54 amending section 77 (*Applications to court*)
- Head 56 inserting a new section 78A (*Notification to Director that donor lacks capacity in relation to one or more relevant decisions that are subject of enduring power of attorney*)
- Head 58 inserting a new section 79A (*Matters to be specified by the Director in relation to enduring powers of attorney*)
- Head 59 amending section 80 (*Offences in relation to enduring powers of attorney*) of the Act of 2015.

DRAFT

Head 48 Amendment of section 71 of Act of 2015

Provide that:

Section 71 of the Act of 2015 is amended in subsection (2) by the deletion of paragraph (c)

Explanatory Note:

The proposed deletion of subsection (2)(c) of section 71 (*Objections to registration*) of the Act of 2015 is required because, as a result of the proposed new two stage process, an objection on the grounds of lack of capacity is no longer valid at the registration stage. Currently the process involves registering an Enduring Power of Attorney (EPA) when the donor loses capacity. The proposed new process requires that the EPA be registered while the donor has capacity and is in a position to discuss the EPA with the DSS. The second stage is where the attorney notifies the DSS that the donor has lost capacity and at that stage the EPA comes into force.

The proposed introduction of a two-stage EPA process will require the amendment of a number of other sections in the Act of 2015 including

- Head 8 amending section 13 (*Disqualification as decision-making assistant*)
- Head 14 amending section 20 (*Nullity*)
- Head 24 amending section 40 (*Disqualification as decision-making representative*)
- Head 39 amending section 60 (*Content of instrument creating an enduring power of attorney*)
- Head 40 amending section 61 (*Notice of execution of an enduring power of attorney*)
- Head 43 amending section 66 (*Disqualification of attorney*)
- Head 44 amending section 67 (*Function of court prior to registration*)
- Head 45 amending section 68 (*Application for registration of instrument creating enduring power*)
- Head 46 to amend section 69 (*Registration of an instrument creating an enduring power of attorney*)
- Head 47-deleting section 70 (*Effect and proof of registration*)
- Head 49 amending section 72 (*Register of Enduring Powers*)
- Head 50 amending section 73 (*Revocation and variation of enduring power*)
- Head 51 amending section 74 (*Disclaimer by attorney*)
- Head 52 amending section 75 (*Reports by attorney*)
- Head 54 amending section 77 (*Applications to court*)
- Head 56 inserting a new section 78A (*Notification to Director that donor lacks capacity in relation to one or more relevant decisions that are subject of enduring power of attorney*)

- Head 58 inserting a new section 79A (*Matters to be specified by the Director in relation to enduring powers of attorney*)
- Head 59 amending section 80 (*Offences in relation to enduring powers of attorney*) of the Act of 2015.

DRAFT

Head 49 Amendment of section 72 of Act of 2015

Provide that

The Act of 2015 is amended in section 72

(a) in subsection (3) by the substitution of

“The Director shall make notified instruments on the Register available for inspection” for “The Director shall make the Register available for inspection”

(b) in subsection (4) by the substitution of

“a notified enduring power,” for “an enduring power,”

Explanatory note:

This Head amends section 72 (*Register of Enduring Powers*) of the Act of 2015 to provide that only notified instruments on the Register may be made available by the Director for inspection.

This Head provides for a change in the process of registering an Enduring Power of Attorney (EPA). Currently the process involves registering the EPA when the donor loses capacity. The proposed new process requires that the EPA be registered at execution of the EPA while the donor has capacity and is in a position to discuss the EPA with the DSS. The second stage is when the attorney notifies the DSS that the donor has lost capacity and at that stage the EPA enters into force.

Only notified EPAs (i.e. EPAs which are in force because the donor has now lost capacity) can be made available for inspection. Such EPAs will no longer be described as ‘registered’ EPAs because of the changed process proposed under this Bill.

The proposed introduction of a two-stage EPA process will require the amendment of a number of other sections in the Act of 2015 including

- Head 8 amending section 13 (*Disqualification as decision-making assistant*)
- Head 14 amending section 20 (*Nullity*)
- Head 24 amending section 40 (*Disqualification as decision-making representative*)
- Head 39 amending section 60 (*Content of instrument creating an enduring power of attorney*)
- Head 40 amending section 61 (*Notice of execution of an enduring power of attorney*)
- Head 43 amending section 66 (*Disqualification of attorney*)
- Head 44 amending section 67 (*Function of court prior to registration*)

- Head 45 amending section 68 (*Application for registration of instrument creating enduring power*)
- Head 46 to amend section 69 (*Registration of an instrument creating an enduring power of attorney*)
- Head 47 deleting section 70 (*Effect and proof of registration*)
- Head 48 amending section 71 (*Objections to registration*)
- Head 50 amending section 73 (*Revocation and variation of enduring power*)
- Head 51 amending section 74 (*Disclaimer by attorney*)
- Head 52 amending section 75 (*Reports by attorney*)
- Head 54 amending section 77 (*Applications to court*)
- Head 56 inserting a new section 78A (*Notification to Director that donor lacks capacity in relation to one or more relevant decisions that are subject of enduring power of attorney*)
- Head 58 inserting a new section 79A (*Matters to be specified by the Director in relation to enduring powers of attorney*)
- Head 59 amending section 80 (*Offences in relation to enduring powers of attorney*) of the Act of 2015.

DRAFT

Head 50 Amendment of section 73 of Act of 2015¹⁶

Provide that:

Section 73 of the Act of 2015 is amended—

(a) in subsection (1) –

by the substitution of “An enduring power of attorney may be varied or revoked by the donor, where the attorney has not notified the Director that the donor has lost capacity and where the donor has capacity to make the variation or revocation, as the case may be” for “An enduring power of attorney may be varied or revoked by the donor, where the instrument creating the enduring power of attorney has not been registered and where the donor has capacity to make the variation or revocation, as the case may be.”

(aa) in subsection (2) –

by the substitution of “specified by the Director under section 79A” for “prescribed”,

(b) in subsection (4)—

(i) by the insertion of “and” after “revocation;” in paragraph (c),

(ii) by the substitution of “revocation.” for “revocation; and” in paragraph (d),

(iii) by the deletion of paragraph (e),

(c) by the insertion of the following subsection after subsection (4):

“(4A) The donor shall, as soon as practicable after the variation or revocation of an enduring power of attorney, give notice to the attorney, in such form as shall be specified by the Director under section 79A, of such variation or revocation.”.

(d) by the substitution of the following for subsection (5)

“(5) Subject to *subsection (6)* a donor may, after the attorney notifies the Director that the donor lacks capacity in relation to one or more of the relevant decisions which are the subject of the power, revoke the enduring power where he or she has capacity to do so.

¹⁶ The drafting of the amendments to the Act of 2015 in paragraphs (b) and (c) and their introduction at Dáil Report Stage of the Disability (Miscellaneous Provisions) Bill 2016 were approved by the previous Government on 22 January 2019.

(e) by the insertion of the following after subsection (6)

“(7) An application to vary may not be made less than 6 months from the date of registration of the enduring power of attorney which it varies, and thereafter at intervals of not less than 12 months, unless a shorter period is agreed by the Director.”

Explanatory Note:

This Head provides for amendments to section 73 (*Revocation and variation of enduring power*) of the Act of 2015.

The proposed amendment to subsection (1) is related to and consequential to the proposed two-step process for the notification of enduring power of attorney to the Director and provides that an enduring power of attorney may be varied or revoked by the donor, where the attorney has not notified the Director that the donor has lost capacity and where the donor has capacity to make the variation or revocation.

The proposed amendment to subsection (2) is consequential on the proposed amendments to section 79 (*Regulations*) of the Act and the proposed new section 79A (*Matters to be specified by Director in relation to enduring powers of attorney*) to provide for specification of forms by the Director of the Decision Support Service. Forms are currently required to be prescribed by the Minister in Regulations but it is proposed instead to provide for the Director to specify forms. Providing for forms relating to the Act to be specified by the Director is considered to be consistent with the provisions of the Mental Health Act 2001 which requires forms relating to that Act to be specified by the Mental Health Commission.

Similar and related amendments are contained in:

- Head 5 amending section 9 (*Definitions – Part 3*)
- Head 6 amending section 10 (*Decision-making assistance agreement*)
- Head 12 amending section 16 (*Definitions - Part 4*)
- Head 13 amending section 17 (*Co-decision-making agreement*)
- Head 16 amending to section 24 (*Objections to registration*)
- Head 17 amending section 27 (*Reports by co-decision-maker*)
- Head 18 amending section 28 (*Variation of co-decision-making agreement*)
- Head 21 amending section 31 (*Regulations*)
- Head 22 inserting a new section 31A (*Matters to be specified by Director in relation to co-decision-making agreements*);
- Head 36 amending section 58 (*Interpretation - Part 7*)
- Head 38 amending section 59 (*Enduring power of attorney – general*)
- Head 52 amending section 75 (*Reports by attorney*)
- Head 57 amending section 79 (*Regulations*) of the Act of 2015
- Head 58 inserting a new section 79A (*Matters to be specified by the Director in relation to enduring powers of attorney*).

This Head also provides for the deletion of subsection (4)(e). This subsection provides that that one of the statements which shall accompany a variation or revocation of an enduring power of attorney is a statement “by the attorney, that he or she is aware of the variation or revocation and undertakes to act accordingly.” It is considered that the operation of this provision is likely to prove difficult in practice. The donor may wish to vary or revoke the enduring power of attorney on the basis that the proposed attorney has become uncontactable, unwilling or unsuitable on some other basis. A statement from the attorney is unlikely to be forthcoming. The issue of ensuring that an attorney is aware of the variation or revocation of an enduring power of attorney may be better addressed by requiring the donor to give formal notice to the attorney of the variation or revocation as included in subsection (4A), and removing the requirement for a statement from the attorney. The form of notice required has been included in the new Section 79A (*Matters to be specified by Director in relation to enduring powers of attorney*) under Head 58.

The deletion of subsection (4)(e) gives rise to technical amendments in the preceding paragraphs (c) and (d).

The proposed new subsection (5) provides that a donor may, after the Attorney notifies the Director that the donor lacks capacity in relation to one or more of the relevant decisions which are the subject of the power, revoke the enduring power where he or she has capacity to do so.

The proposed new subsection (8) provides that an application to vary may not be made less than 6 months from the date of registration of the enduring power of attorney which it varies, and thereafter at intervals of not less than 12 months, unless a shorter period is agreed by the Director.

The proposed introduction of a two-stage EPA process will require the amendment of a number of other sections in the Act of 2015 including

- Head 8 amending section 13 (*Disqualification as decision-making assistant*)
- Head 14 amending section 20 (*Nullity*)
- Head 24 amending section 40 (*Disqualification as decision-making representative*)
- Head 39 amending section 60 (*Content of instrument creating an enduring power of attorney*)
- Head 40 amending section 61 (*Notice of execution of an enduring power of attorney*)
- Head 43 amending section 66 (*Disqualification of attorney*)
- Head 44 amending section 67 (*Function of court prior to registration*)
- Head 45 amending section 68 (*Application for registration of instrument creating enduring power*)
- Head 46 to amend section 69 (*Registration of an instrument creating an enduring power of attorney*)
- Head 47 deleting section 70 (*Effect and proof of registration*)
- Head 48 amending section 71 (*Objections to registration*)
- Head 49 amending section 72 (*Register of Enduring Powers*)

- Head 51 amending section 74 (*Disclaimer by attorney*)
- Head 52 amending section 75 (*Reports by attorney*)
- Head 54 amending section 77 (*Applications to court*)
- Head 56 inserting a new section 78A (*Notification to Director that donor lacks capacity in relation to one or more relevant decisions that are subject of enduring power of attorney*)
- Head 58 inserting a new section 79A (*Matters to be specified by the Director in relation to enduring powers of attorney*)
- Head 59 amending section 80 (*Offences in relation to enduring powers of attorney*) of the Act of 2015.

DRAFT

Head 51 Amendment of section 74 of Act of 2015¹⁷

Provide that:

Section 74 of the Act of 2015 is amended by the substitution of the following for section 74 –

“74. (1) An attorney may disclaim an enduring power of attorney where that attorney has not notified the Director that the donor lacks capacity in relation to one or more of the relevant decisions which are the subject of the power, subject to his or her giving notice of such disclaimer to the donor.

(1A) Where there is more than one attorney appointed under an enduring power of attorney, in the case of any one or more of them disclaiming the enduring power of attorney before the Director has been notified that the donor lacks capacity in one or more relevant decisions which are the subject of the power subject to his or her giving notice to the donor, the instrument may be notified and enter into force in respect of the remaining attorney or attorneys, as the case may be, unless the enduring power expressly provides to the contrary.”

(2) Where the Attorney has notified the Director that the donor lacks capacity in relation to one or more of the relevant decisions which are the subject of the power, the enduring power created by the instrument may only be disclaimed by an attorney with the consent of the court.”

Explanatory Note:

This Head provides for the substitution of section 74 (*Disclaimer by attorney*) of the Act of 2015 with a new section 74 to enable an enduring power of attorney to be notified and entered into force in respect of the remaining attorney or attorneys in the case of disclaimer by another attorney appointed under the enduring power of attorney. It should be noted that this may not happen where the EPA expressly provides against it. Where a donor wishes to have more than one attorney at all times, he or she should ensure that this be clearly set out in the EPA and provision made for a successor to be appointed in the event that one of the attorneys dies, lacks capacity, is disqualified or disclaims the EPA.

¹⁷ The drafting of the amendment inserting a new subsection (1A) was approved by the previous Government for introduction at Dáil Report Stage of the lapsed Disability (Miscellaneous Provisions) Bill 2016.

A similar amendment is included in Head 45 amending section 68 (*Application for registration of instrument creating enduring power*) to provide for an attorney or attorneys to disclaim an EPA before registration. This Head relates to a disclaimer before notification.

The proposed new section 74 also provides that an attorney may disclaim an enduring power of attorney in circumstances where no notification of lack of capacity has been notified to Director. The consent of the court is required where the attorney notifies the Director that the donor lacks capacity and where that attorney wishes to disclaim the enduring power of attorney.

The proposed introduction to a two-stage EPA process will require a number of sections in the Act of 2015 to be amended including

- Head 8 amending section 13 (*Disqualification as decision-making assistant*)
- Head 14 amending section 20 (*Nullity*)
- Head 24 amending section 40 (*Disqualification as decision-making representative*)
- Head 39 amending section 60 (*Content of instrument creating an enduring power of attorney*)
- Head 40 amending section 61 (*Notice of execution of an enduring power of attorney*)
- Head 43 amending section 66 (*Disqualification of attorney*)
- Head 44 amending section 67 (*Function of court prior to registration*)
- Head 45 amending section 68 (*Application for registration of instrument creating enduring power*)
- Head 46 to amend section 69 (*Registration of an instrument creating an enduring power of attorney*)
- Head 47 deleting section 70 (*Effect and proof of registration*)
- Head 48 amending section 71 (*Objections to registration*)
- Head 49 amending section 72 (*Register of Enduring Powers*)
- Head 50 amending section 73 (*Revocation and variation of enduring power*)
- Head 52 amending section 75 (*Reports by attorney*)
- Head 54 amending section 77 (*Applications to court*)
- Head 56 inserting a new section 78A (*Notification to Director that donor lacks capacity in relation to one or more relevant decisions that are subject of enduring power of attorney*)
- Head 58 inserting a new section 79A (*Matters to be specified by the Director in relation to enduring powers of attorney*)
- Head 59 amending section 80 (*Offences in relation to enduring powers of attorney*) of the Act of 2015.

Head 52 Amendment of section 75 of Act of 2015¹⁸

Provide that:

Section 75 of the Act of 2015 is amended—

(a) in subsection (1) by the substitution of the following for subsection (1)

“(1) An attorney under an enduring power of attorney which confers authority in relation to property and affairs shall, within 3 months of the attorney notifying the Director that the donor lacks capacity in relation to one or more of the relevant decisions which are the subject of the power, submit to the Director a schedule of the donor’s assets and liabilities and a projected statement of the donor’s income and expenditure.”

(aa) in subsection (2)(b), by the insertion of “, by a general visitor” after “Director”

(b) in subsection (3) by the substitution of the following for subsection (3)

“(3) An attorney shall, within 12 months after notifying the Director that the donor lacks capacity in relation to one or more of the relevant decisions which are the subject of the power, and thereafter at intervals of not more than 12 months, prepare and submit to the Director a report in writing as to the performance of his or her functions as such attorney during the relevant period.”

(c) in subsection (4)—

(i) by the substitution of “specified by the Director under section 79A” for “prescribed by regulations made under section 79”,

(ii) by the substitution of “as are specified by the Director” for “as are prescribed”,

(ca) by the deletion of subsection (5)

(caa) in subsection (7)(a)

(i) by the substitution of “specifications made by the Director under section 79A” for “regulations made under section 79”,

(ii) by the substitution of “relevant specifications” for “relevant regulations”,

¹⁸ The amendments to section 75 of the Act in paragraphs (aa), (d) and (e) were brought forward at Committee Stage of the Disability (Miscellaneous Provisions) Bill on 30 January 2019.

(d) in subsection (7)(b), by the substitution of “attorney” for “co-decision-maker”,
and

(e) in subsection (8), by the substitution of “subsection (7)(b)” for “subsection (7)(a)”

(f) in subsection (9), by the substitution of the following for subsection (9)

“(9) In this section “relevant period” means the period of time to which the report relates which shall be the period of time between the date the attorney notified the Director that the donor lacks capacity in relation to one or more of the relevant decisions which are the subject of the power or the date of submission of the previous report, as the case may be, and the date immediately preceding the date of submission of the report concerned.”

Explanatory Note:

This Head provides for the amendment of section 75 (*Reports by attorney*) of the Act of 2015, which provides for reports to the Director by attorneys under an Enduring Power of Attorney (EPA) under the 2015 Act.

Section 75(1) is amended to require the attorney to submit financial reports to the Director 3 months after the notification step of the process rather than at the registration stage.

Section 75(2)(b) currently requires an attorney who has authority to make decisions in relation to a person’s property and affairs to keep proper accounts and financial records in respect of the person’s income and expenditure. The attorney must submit the accounts and records as part of a report to the Director and make them available for inspection by the Director or by a special visitor. Section 99 (*Special visitors and general visitors*) of the Act gives the Director of the Decision Support Service the power to appoint a person to be a special visitor or a general visitor. A special visitor is a medical practitioner or other person with particular knowledge, expertise and experience as respects the capacity of persons. A general visitor is a person who possesses relevant qualifications, expertise or experience to assist the Director in supervising decision-making representatives, co-decision-makers attorneys, designated healthcare representatives and decision-making assistants.

The reference in section 75(2)(b) should include both general and special visitors as both may need to review accounts and records as part of an assessment of capacity relating to decisions about the person’s finances. A person assessing capacity may need to take up a range of records and inspect financial accounts and records in order to conduct a functional assessment of capacity. The amendment has been updated since it was approved by Government to require attorneys with decision-making authority in relation to property and affairs to make financial accounts and records available for inspection by the Director, by a general visitor or by a special visitor. A similar amendment is included in Head 29 in relation to section 46 (*Reports by decision-making representative*) so that decision-making

representatives must make financial accounts available to both general and special visitors. This is to facilitate investigations by the Director of the Decision Support Service, where necessary.

Section 75(3) is amended to require the attorney to submit annual reports to the Director after the notification step of the process rather than at the registration stage.

The proposed amendments to subsections (4) and (7)(a) are related to and consequential to the proposed amendments to section 79 (*Regulations*) of the Act and the proposed new section 79A (*Matters to be specified by Director in relation to enduring powers of attorney*) to provide for specification of certain matters by the Director of the Decision Support Service. Forms are currently required to be prescribed by the Minister in regulations but it is now proposed to provide that the Director may specify forms. Providing for forms relating to the Act to be specified by the Director is considered to be consistent with the provisions of the Mental Health Act 2001 which requires forms relating to that Act to be specified by the Mental Health Commission.

Similar and related amendments are contained in:

- Head 5 amending section 9 (*Definitions – Part 3*)
- Head 6 amending section 10 (*Decision-making assistance agreement*)
- Head 12 amending section 16 (*Definitions - Part 4*)
- Head 13 amending section 17 (*Co-decision-making agreement*)
- Head 16 amending to section 24 (*Objections to registration*)
- Head 17 amending section 27 (*Reports by co-decision-maker*)
- Head 18 amending section 28 (*Variation of co-decision-making agreement*)
- Head 21 amending section 31 (*Regulations*)
- Head 22 inserting a new section 31A (*Matters to be specified by Director in relation to co-decision-making agreements*);
- Head 36 amending section 58 (*Interpretation - Part 7*)
- Head 38 amending section 59 (*Enduring power of attorney – general*)
- Head 50 amending section 73 (*Revocation and variation of enduring power*)
- Head 57 amending section 79 (*Regulations*) of the Act of 2015
- Head 58 inserting a new section 79A (*Matters to be specified by the Director in relation to enduring powers of attorney*).

The proposed deletion of subsection (5) is consequential on the policy decision to remove provisions relating to restraint from the Act of 2015.

The proposed amendment to subsection (7)(b) provides for the replacement of an incorrect reference to a 'co-decision-maker' with a correct reference to an 'attorney'.

The purpose of the proposed amendment to subsection (8) is to replace an incorrect reference to 'subsection (7)(a)' with a correct reference to 'subsection (7)(b)'.

The proposed new subsection (9) provides a new definition of 'relevant period' for section 75 to refer to notification rather than registration and is required as a consequence of the proposed new two-step process for EPAs.

The proposed introduction of a two-stage EPA process will require the amendment of a number of other sections in the Act of 2015 including

- Head 8 amending section 13 (*Disqualification as decision-making assistant*)
- Head 14 amending section 20 (*Nullity*)
- Head 24 amending section 40 (*Disqualification as decision-making representative*)
- Head 39 amending section 60 (*Content of instrument creating an enduring power of attorney*)
- Head 40 amending section 61 (*Notice of execution of an enduring power of attorney*)
- Head 43 amending section 66 (*Disqualification of attorney*)
- Head 44 amending section 67 (*Function of court prior to registration*)
- Head 45 amending section 68 (*Application for registration of instrument creating enduring power*)
- Head 46 to amend section 69 (*Registration of an instrument creating an enduring power of attorney*)
- Head 47 deleting section 70 (*Effect and proof of registration*)
- Head 48 amending section 71 (*Objections to registration*)
- Head 49 amending section 72 (*Register of Enduring Powers*)
- Head 50 amending section 73 (*Revocation and variation of enduring power*)
- Head 51 amending section 74 (*Disclaimer by attorney*)
- Head 54 amending section 77 (*Applications to court*)
- Head 56 inserting a new section 78A (*Notification to Director that donor lacks capacity in relation to one or more relevant decisions that are subject of enduring power of attorney*)
- Head 58 inserting a new section 79A (*Matters to be specified by the Director in relation to enduring powers of attorney*)
- Head 59 amending section 80 (*Offences in relation to enduring powers of attorney*) of the Act of 2015.

Head 53 Amendment of section 76 of Act of 2015

Provide that:

Section 76 of the Act of 2015 is amended—

(a) by substituting “enduring powers of attorney” for “attorneys” in the shoulder note,

(b) in subsection (1)—

(i) in paragraph (c), by the substitution of “attorney or to vary or revoke an enduring power of attorney;” for “attorney.”, and

(ii) by the insertion of the following after paragraph (c):

“(d) that the donor did not, at the time the enduring power of attorney was executed, have the capacity to understand the implications of creating the power.”,

(c) in subsection (2) –

(i) in paragraph (c) by the insertion of “ or to vary or revoke an enduring power of attorney; and” after “to appoint an attorney under the Act of 1996.”

(ii) by the insertion of the following after paragraph (c):

“(d) that the donor did not, at the time the enduring power of attorney was executed, have the capacity to understand the implications of creating the power.”,

(d) in subsection (3) –

(i) by the substitution in paragraph (b) of “view, or” for “view.”

(ii) by the insertion of the following after paragraph (b)

“(c) where he or she is of the view that the complaint is well founded but that -

(v) mere clarification of the attorney role is a more appropriate resolution, or

(vi) the subject matter of the complaint is otherwise better addressed under section 96(4),

the Director may, within 21 days of having completed his or her investigation, and having obtained the written consent of the

complainant and the person who is the subject of the complaint and the relevant person concerned or, where the written consent of the relevant person cannot be obtained, having determined it to be, to the greatest extent possible, the will and preference of the relevant person, decline to make an application to the court and address the complaint under (i) or (ii) above.”.

(da) by the deletion of subsections (4), (5), (6), (7), (8) and (9).

(e) by the insertion of the following after subsection (3)

“(4) When carrying out an investigation under this section, the provisions of section 96(2), 96(4), 96(6), 96(7) and 96(8) shall apply.

(5) Where the Director fails to secure the consent of any person under subsection (2)(c), or where he or she reasonably believes it to be the will and preference of the relevant person concerned, he or she shall make an application to the court for a determination in relation to a matter specified in the complaint.”.

(6) A person who receives a notification under *subsection (2)(b)* may, not later than 21 days after the date of issue of the notification, appeal a decision of the Director that the complaint is not well founded to the court.

(7) The Director may, notwithstanding that no complaint has been received, on his or her own initiative carry out an investigation and make an application to the court for a determination in relation to any matter specified in *subsection (1)*.

(8) The court may—

- (e) pursuant to an application to it under *subsection (2)(a) or (4)*, or
- (f) pursuant to an appeal under subsection (6),

make a determination in relation to a matter specified in subsection (1) and may, if it considers it appropriate, determine that an attorney shall no longer act as such in relation to the appointer concerned.

(9) Complaints shall be made within 12 months of the incident or knowledge of the incident. The Director may admit late complaints at his or her discretion. A late complaint not accepted by the Director can be appealed to the Court not later than 21 days after the date of issue of the Directors decision.”.

Explanatory Note

This Head provides for the amendment of section 76 (*Complaints in relation to attorneys*) of the Act of 2015. It is proposed to amend the shoulder note to more accurately reflect the content of its provisions.

This Head provides for the inclusion, as grounds for a complaint, that the appointer was induced to vary or revoke an agreement. In relation to proposed amendment to subsection (1)(c) the question has been asked as to whether all of the grounds for complaint that apply to co-decision-making agreements in section 30(1) (a) to (g) (*Complaints in relation to co-decision-makers*) of the Act should be replicated in relation to attorneys under section 76(1). For instance, while the Director will be able to examine a complaint about a relevant person's capacity to appoint a co-decision-maker, the Director will not, under section 76 as currently drafted, have the power to examine a complaint about a relevant person's capacity to appoint an attorney.

Following consideration of the grounds of complaint listed in section 30(1), it is proposed to add to the grounds of complaint in section 76(1) the ground that the donor did not, at the time the enduring power of attorney was executed, have the capacity to understand the implications of creating the power.

The intention with the proposed insertion of a new subsection (3)(c) is to provide a means of resolving complaints outside of application to the courts. The consent of the parties concerned is sought so that the Director is not being called on to resolve the matters in subsection (1), which could be regarded as justiciable controversies and therefore the sole purview of the courts, but is instead seeking the consent of the parties involved to set aside a justiciable controversy in favour of a more appropriate method of resolution. This is intended to prevent an undesirable binary in the Act of 2015 where all complaints, regardless of nature, are forced into the courts system once a complaint is found to be well-founded, no matter how appropriate a method of resolution that may be. Seeking the consent of the parties for an alternate resolution allows more flexible methods of resolution such as, for example, in instances of innocent mistake or misunderstanding of a decision supporter's role.

The proposed new subsection (4) is intended to seek to ensure that the suite of powers possessed by the Director in relation to investigations, specified in section 96, apply to investigations here.

The new subsection (5) provides that the Director shall apply to the court for determination of a matter specified in a complaint where the consent of the parties concerned cannot be obtained to set it aside. This course of action could be inferred from the consequences of the proposed subsection (3)(c), but has been included in the General Scheme for the avoidance of doubt, and to make sure that complaints do not fall.

This Head also inserts a new subsection (9) to provide that complaints shall be made within 12 months of the incident or knowledge of the incident and that the Director may use his or her discretion to admit a late complaint.

Head 54 Amendment of section 77 of Act of 2015

Provide that:

Section 77 of the Act of 2015 is amended in subsection (3) by the substitution of

“Where an attorney has notified the Director that the donor lacks capacity in relation to one or more of the relevant decisions which are the subject of the power, the court may, whether on application by the donor, the attorney, the Director or an interested party” for “Where an instrument creating an enduring power of attorney has been registered, the court may, whether on application by the donor, the attorney, the Director or an interested party”

Explanatory Note:

The purpose of this Head to provide for an amendment to section 77 (*Applications to court*) of the Act of 2015 to enable the court to register an enduring power of attorney in circumstances where section 59 (*Enduring power of attorney – general*) and section 60 (*Content of instrument creating an enduring power of attorney*) have not been complied with or where the application to register is not in accordance with section 68 (*Application for registration of instrument creating enduring power*).

The Head amends section 77(3) and is required due to the new two-step process. The power of the court to determine any question in relation to the meaning of the EPA is only necessary after the EPA enters into force after the notification stage and not at the registration stage as currently provided.

The proposed introduction of a two-stage EPA process will require the amendment of a number of other sections in the Act of 2015 including

- Head 8 amending section 13 (*Disqualification as decision-making assistant*)
- Head 14 amending section 20 (*Nullity*)
- Head 24 amending section 40 (*Disqualification as decision-making representative*)
- Head 39 amending section 60 (*Content of instrument creating an enduring power of attorney*)
- Head 40 amending section 61 (*Notice of execution of an enduring power of attorney*)
- Head 43 amending section 66 (*Disqualification of attorney*)
- Head 44 amending section 67 (*Function of court prior to registration*)
- Head 45 amending section 68 (*Application for registration of instrument creating enduring power*)

- Head 46 to amend section 69 (*Registration of an instrument creating an enduring power of attorney*)
- Head 47 deleting section 70 (*Effect and proof of registration*)
- Head 48 amending section 71 (*Objections to registration*)
- Head 49 amending section 72 (*Register of Enduring Powers*)
- Head 50 amending section 73 (*Revocation and variation of enduring power*)
- Head 51 amending section 74 (*Disclaimer by attorney*)
- Head 52 amending section 75 (*Reports by attorney*)
- Head 56 inserting a new section 78A (*Notification to Director that donor lacks capacity in relation to one or more relevant decisions that are subject of enduring power of attorney*)
- Head 58 inserting a new section 79A (*Matters to be specified by the Director in relation to enduring powers of attorney*)
- Head 59 amending section 80 (*Offences in relation to enduring powers of attorney*) of the Act of 2015.

DRAFT

Head 55 Amendment of section 78 of Act of 2015¹⁹

Provide that:

Section 78 of the Act of 2015 is amended -

(a) in subsection (1), by the substitution of the following for paragraph (b):

“(b) subject to subsection (2), the attorney appointed under the instrument becomes disqualified or disclaims the enduring power of attorney.”,

(b) by the substitution of the following for subsection (2):

“(2) Where there is more than one attorney appointed under an enduring power of attorney or where the donor has specified a person who shall act as attorney for him or her in the event that the attorney on whom the authority is conferred dies or is unable to act, is disqualified or disclaims the enduring power of attorney, then in the circumstances described in subsection (1), the Director shall note on the Register in connection with the power concerned the revocation, disqualification or disclaimer, as the case may be.”.

Explanatory Note:

This Head provides for the amendment of section 78 (*Removal of instrument from Register*) of the Act of 2015. The proposed 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 and where there is only one attorney. The amendment to subsection (2) provides for the Director to note a disclaimer by an attorney on the Register (where there is more than one attorney) and in those circumstances the EPA remains in force with the remaining attorney or attorneys.

¹⁹ The drafting of this amendment was approved by the previous Government for introduction at Dáil Report Stage of the lapsed Disability (Miscellaneous Provisions) Bill 2016.

Head 56 NEW SECTION 78A - Notification to Director that donor lacks capacity in relation to one or more relevant decisions that are subject of enduring power of attorney

Provide that

The Act of 2015 is amended by the insertion of the following after section 78 –

“78A. (1) Where an attorney has reason to believe that a donor lacks capacity in relation to one or more relevant decisions that are the subject of the enduring power of attorney, the attorney shall, as soon as is practicable, notify the Director, in compliance with this Part and in such form as specified by the Director under section 79A.

- (2) (a) The attorney shall, at the same time as he or she notifies the Director under subsection (1), give notice, in such form as shall be specified under section 79A, of the notification to the following persons:
- (i) the donor;
 - (ii) a spouse or civil partner (if any) of the donor;
 - (iii) the cohabitant (if any) of the donor;
 - (iv) any children of the donor who have attained the age of 18 years;
 - (v) any decision-making assistant for the donor;
 - (vi) any co-decision-maker for the donor;
 - (vii) any decision-making representative for the donor;
 - (viii) any designated healthcare representative for the donor;
 - (ix) any other attorney for the donor or attorney under the Act of 1996 in respect of the donor; and
 - (x) any other person or persons as may be specified by the donor in the instrument creating the enduring power of attorney as a person or persons to whom notice shall be given under this section and section 68(3).

(b) Where there are fewer than 3 persons to whom notice may be given pursuant to this section the donor shall specify 2 persons in the instrument creating the enduring power of attorney as persons to whom notice shall be given under this section and section 68(3).

(c) Subsection (2)(a)(ii) shall not apply to the spouse or civil partner of the appointer where—

(a) a decree of judicial separation is granted to either spouse by a court in the State or any decree is so granted by a court outside the State and is recognised in the State as having like effect,

(b) a written agreement to separate is entered into between the spouses,

(c) subject to section 2(2), the spouses separate and cease to cohabit for a continuous period of 12 months,

(d) a written agreement to separate is entered into between the civil partners, or

(e) subject to section 2(2), the civil partners separate and cease to cohabit for a continuous period of 12 months.

(d) Subsection (2)(a)(iii) shall not apply where, subject to section 2(2), the cohabitants separate and cease to cohabit for a continuous period of 12 months.”,

(3) The notification, under subsection (1), to the Director shall be accompanied by-

(a) a statement by a registered medical practitioner and a statement by such other healthcare professional of a class as shall be prescribed that in their opinion the donor lacks capacity in relation to one or more relevant decisions which are the subject of the enduring power, and

(b) a copy of any notice given pursuant to subsection (2)

(4) Where there is more than one attorney appointed under an enduring power of attorney, any two or more of the attorneys may jointly notify the Director.

(5) Notice parties may, no later than 5 weeks from the date on which notice is given, object to the notification, in the form specified by the Director under section 79A, on grounds that

(a) the donor has not lost capacity;

(b) supporting statements for notification do not meet legal requirements;

(c) notice requirements for notification not met.

(6) Where the Director receives an objection he or she shall –

(a) review the objection,

(b) consult with the attorney and, where the Director considers it is appropriate to do so, the donor, and

(c) consult with such other persons as he or she considers relevant, and shall –

- (i) where he or she is of the view that the objection is not well founded, notify the person who made the objection of his or her view, provide reasons for that view and activate the instrument concerned so that it enters into force, or
- (ii) where he or she is of the view that the objection is well founded, notify the person who made the objection of his or her view and make an application to the court for a determination on the matter and for a determination as to whether the enduring power should be activated and enter into force.

(6A) The court, pursuant to an application made to it may –

- (a) require the Director to activate the instrument to bring the enduring power of attorney into force,
- (b) declare that the instrument should not be activated, or
- (c) make such other declaration or order as it considers appropriate.

(6B) (1) On receipt of a notification under subsection (1), the Director shall review the notification and any objections received under subsection (6) and shall carry out such reasonable enquiries as he or she considers necessary in order to establish whether the following criteria are met –

- (a) the notification is in accordance with the form specified by the Director under section 79A
- (b) the notification is in accordance with subsections (2) and (3).

(7) A document purporting to be a copy of an instrument creating an enduring power of attorney which has been authenticated by the Director shall be evidence of the contents of the instrument and the date on which it was entered into force.

(8) A date-stamped copy of an instrument, including any variation, may be captured from the Register for the purposes of providing an authenticated copy.

(9) The effect of notification under this section is that -

- (a) A revocation of the enduring power of attorney by the donor shall be not be valid unless the court confirms the revocation under section 73(6),

(b) a disclaimer of an enduring power shall not be valid except on notice to the donor and with the consent of the court, and

(c) a donor may not extend or restrict the scope of the authority conferred by him or her in the enduring power and no consent or instruction given by the donor after notification of the instrument shall, in the case of a consent, confer any right and in the case of an instruction, impose or confer any obligation or right on or create any liability of the attorney or other persons having notice of the consent or instruction.

(10) Subsection (9) applies for so long as the instrument is in force whether or not the donor has for the time being capacity.

Explanatory Note:

This is one of a number of Heads the purpose of which is to provide for the proposed change in the process of registering an enduring power of attorney (EPA). Under the Act of 2015 an EPA may be registered when a donor loses capacity. The new process requires that an EPA is to be registered at the stage of execution of the EPA while the donor has capacity and is in a position to discuss issues with the DSS. The second step in the proposed new process provides for the attorney to notify the DSS at the stage where the donor loses capacity and at that stage the EPA is activated. The policy intention is to provide that relevant checks and balances currently stipulated at registration stage should be provided at notification stage.

The proposed introduction of a two-stage process will require a number of sections in Part 7 of the Bill to be amended.

The proposed new section 78A (*Notification to Director that donor lacks capacity in relation to one or more relevant decisions that are subject of enduring power of attorney*) provides for the second stage (notification) of the two-step process.

The provisions in subsections (1) and (2), currently in section 61 (*Notice of execution of an enduring power of attorney*) of the Act of 2015, are proposed to be moved to this new section as the provisions are now relevant to the second stage of the two-stage process when the EPA comes into force.

Similarly, subsection 3(a) is proposed to be moved from section 68(7)(b) (*Application for registration of instrument creating enduring power*) of the Act of 2015 to this new section as medical statements are no longer required at registration stage as the donor still has capacity. They are instead required at the notification stage when the donor has lost capacity.

Subsections (4), (5) and (6) provide for notice and objection provisions in relation to the second stage of the two stage process when notification to the Director occurs and the EPA comes into force.

Subsections (7) and (8), currently in section 69 (*Registration of an instrument creating an enduring power of attorney*) of the Act of 2015, are proposed to be moved to this section as the provisions are now relevant to the second stage of the two-stage process when the EPA comes into force.

Similarly, subsections (9) and (10), currently in section 70 (*Effect and proof of registration*) of the Act of 2015, are proposed to be moved to this Head as these provisions are now relevant to the second stage of the two-stage process when the EPA comes into force.

The proposed introduction of a two-stage EPA process will require the amendment of a number of other sections in the Act of 2015 including

- Head 8 amending section 13 (*Disqualification as decision-making assistant*)
- Head 14 amending section 20 (*Nullity*)
- Head 24 amending section 40 (*Disqualification as decision-making representative*)
- Head 39 amending section 60 (*Content of instrument creating an enduring power of attorney*)
- Head 40 amending section 61 (*Notice of execution of an enduring power of attorney*)
- Head 43 amending section 66 (*Disqualification of attorney*)
- Head 44 amending section 67 (*Function of court prior to registration*)
- Head 45 amending section 68 (*Application for registration of instrument creating enduring power*)
- Head 46 to amend section 69 (*Registration of an instrument creating an enduring power of attorney*)
- Head 47 deleting section 70 (*Effect and proof of registration*)
- Head 48 amending section 71 (*Objections to registration*)
- Head 49 amending section 72 (*Register of Enduring Powers*)
- Head 50 amending section 73 (*Revocation and variation of enduring power*)
- Head 51 amending section 74 (*Disclaimer by attorney*)
- Head 52 amending section 75 (*Reports by attorney*)
- Head 54 amending section 77 (*Applications to court*)
- Head 58 inserting a new section 79A (*Matters to be specified by the Director in relation to enduring powers of attorney*)
- Head 59 amending section 80 (*Offences in relation to enduring powers of attorney*) of the Act of 2015.

Head 57 Amendment of section 79 of Act of 2015²⁰

Provide that:

The Act of 2015 is amended by the substitution of the following for section 79:

“79. Regulations (Part 7)

79. The Minister, having regard to the requirements of this Part, shall prescribe by regulations the following matters:

- (a) the class of healthcare professionals under sections 60(1)(d), 68(7)(b), 73(4)(d) and 78A(3)(a);
- (b) the bodies or classes of persons under sections 72(3) and (4) who may inspect the Register and receive an authenticated copy of an enduring power of attorney;
- (c) the safeguards that shall apply in relation to consent and data protection in the conduct of health and social care research involving relevant persons
- (d) the fees to be paid in connection with—
 - (i) an application to register an enduring power of attorney,
 - (ii) an objection to an application to register an enduring power of attorney,
 - (iii) the issue of an authenticated copy of an enduring power of attorney
 - (iv) the variation of an enduring power of attorney
 - (v) the revocation of an enduring power of attorney
 - (vi) an objection to a notification of an enduring power of attorney

²⁰ The drafting of this amendment (other than paragraphs (c), and (d)(iv), (v) and (vi)) was approved by the previous Government for introduction at Dáil Report Stage of the lapsed Disability (Miscellaneous Provisions) Bill 2016.

Explanatory Note:

This Head provides for the amendment of section 79 (*Regulations*) of the Act of 2015. The purpose of the proposed amendments is to provide for the matters to be prescribed by regulations to be made by the Minister to be set out in section 79. Provisions concerning forms were originally in section 79 and were to be prescribed by the Minister but have been moved to a new section 79A in order to provide that the Director may specify and change the forms without the need for Ministerial regulation. The aim is to facilitate the Director to change forms more easily to make them more accessible or to standardise them as appropriate. The new section 79A (*Matters to be specified by the Director in relation to enduring powers of attorney*) provides for the Director of the Decision Support Service to specify the forms to be used in connection with enduring powers of attorney, rather than requiring them to be prescribed by regulations made by the Minister. This is consistent with the provisions of the Mental Health Act 2001 which require forms relating to that Act to be specified by the Mental Health Commission.

Similar and related amendments are contained in:

- Head 5 amending section 9 (*Definitions – Part 3*)
- Head 6 amending section 10 (*Decision-making assistance agreement*)
- Head 12 amending section 16 (*Definitions - Part 4*)
- Head 13 amending section 17 (*Co-decision-making agreement*)
- Head 16 amending to section 24 (*Objections to registration*)
- Head 17 amending section 27 (*Reports by co-decision-maker*)
- Head 18 amending section 28 (*Variation of co-decision-making agreement*)
- Head 21 amending section 31 (*Regulations*)
- Head 22 inserting a new section 31A (*Matters to be specified by Director in relation to co-decision-making agreements*);
- Head 36 amending section 58 (*Interpretation - Part 7*)
- Head 38 amending section 59 (*Enduring power of attorney – general*)
- Head 50 amending section 73 (*Revocation and variation of enduring power*)
- Head 52 amending section 75 (*Reports by attorney*)
- Head 58 inserting a new section 79A (*Matters to be specified by the Director in relation to enduring powers of attorney*).

As a consequence of the proposed inclusion of research under the definition of ‘personal welfare’ in section 2 (*Interpretation – general*) (Head 3) an additional Regulation to be prescribed by the Minister has been included in this section to prescribe the safeguards that shall apply in relation to consent and data protection in the conduct of health and social care research involving relevant persons. As a consequence of the inclusion of the new two-step process for EPAs an additional objection can be raised at notification. Provision has been made in this section for the Minister to make regulations setting out the fee to accompany this objection. Provision has also been made in this Head for two further fees in relation to varying or revoking an EPA.

Head 58 NEW SECTION 79A - Matters to be specified by Director in relation to enduring powers of attorney²¹

Provide that:

The Act of 2015 is amended by the insertion of the following after section 79 –

Matters to be specified by Director in relation to enduring powers of attorney

“79A. (1) The Director, having consulted with the Minister and, if so directed, in accordance with the terms of any direction made by the Minister, shall, in the performance of his or her functions under the provisions of this Act and the requirements of this Part, specify the following matters:

- (a) the form of an instrument creating an enduring power of attorney;
- (b) the form of application under section 68(2) to register an instrument;
- (c) the form of notice under section 68(3) of an application to register an instrument;
- (d) the form of a report under section 75 to be submitted by an attorney to the Director;
- (e) the form under section 78A(1) to notify the Director the donor lacks capacity in relation to one or more of the relevant decisions which are the subject of the power
- (f) the form of notice under section 78A(2) of a notification to the Director that donor lacks capacity in relation to one or more of the relevant decisions which are the subject of the power.
- (g) the form of an objection under section 71(2) to the registration of an instrument creating an enduring power of attorney;
- (h) the form of an objection under section 78A(6B) the notification of an enduring power of attorney
- (i) the form of variation or revocation under section 73(2) of an enduring power of attorney;

²¹ The drafting of this amendment was approved by the previous Government for introduction at Dáil Report Stage of the lapsed Disability (Miscellaneous Provisions) Bill 2016.

(j) the form of notice under section 73(4A) of variation or revocation of an enduring power of attorney.”.

(2) The Director shall have regard to the following principles in the preparation of forms under subsection (1) –

- (a) Forms shall clearly set out the required information in concise and easily understood language and duplication of information shall be avoided in so far as practicable;
- (b) Forms shall be made available in accessible formats, including in an easy to read version.
- (c) The implications (if any) of the proposed intervention for the rights of relevant persons, for potential interveners or for other interested parties, including family members, shall be identified and applicable Guiding Principles including the obligation to respect the relevant person’s will and preferences, shall be set out.
- (d) The relevant data protection provisions shall be included.

Explanatory Note:

This Head provides for a proposed new section 79A (*Matters to be specified by the Director in relation to enduring powers of attorney*) to provide for the forms to be specified by the Director of the Decision Support Service and to be used in connection with enduring powers of attorney (rather than requiring the forms to be prescribed by regulations made by the Minister as provided for in the Act of 2015). A discretionary direction-making power has been reserved for the Minister to ensure oversight but it is not intended to be exercised unless required.

Providing for forms relating to the Act to be specified by the Director is consistent with the provisions of the Mental Health Act 2001 which require forms relating to that Act to be specified by the Mental Health Commission.

Similar and related amendments are contained in:

- Head 5 amending section 9 (*Definitions – Part 3*)
- Head 6 amending section 10 (*Decision-making assistance agreement*)
- Head 12 amending section 16 (*Definitions - Part 4*)
- Head 13 amending section 17 (*Co-decision-making agreement*)
- Head 16 amending to section 24 (*Objections to registration*)
- Head 17 amending section 27 (*Reports by co-decision-maker*)
- Head 18 amending section 28 (*Variation of co-decision-making agreement*)
- Head 21 amending section 31 (*Regulations*)

- Head 22 inserting a new section 31A (*Matters to be specified by Director in relation to co-decision-making agreements*);
- Head 36 amending section 58 (*Interpretation - Part 7*)
- Head 38 amending section 59 (*Enduring power of attorney — general*)
- Head 50 amending section 73 (*Revocation and variation of enduring power*)
- Head 52 amending section 75 (*Reports by attorney*)
- Head 57 amending section 79 (*Regulations*) of the Act of 2015

As a consequence of the new two-step process for EPAs three new forms are provided for as follows:

- the form under section 78A(1) to notify the Director the donor lacks capacity in relation to one or more of the relevant decisions which are the subject of the power
- the form of notice under section 78A(2) of a notification to the Director that donor lacks capacity in relation to one or more of the relevant decisions which are the subject of the power.
- the form of an objection under section 78A(6B) to the notification of an enduring power of attorney

In addition, principles have been set out for the preparation of forms which include the need for clear language, accessible formats, data protection provisions, and the inclusion in the form of the guiding principles and any potential implications of the intervention.

The proposed introduction of a two-stage EPA process will require the amendment of a number of other sections in the Act of 2015 including

- Head 8 amending section 13 (*Disqualification as decision-making assistant*)
- Head 14 amending section 20 (*Nullity*)
- Head 24 amending section 40 (*Disqualification as decision-making representative*)
- Head 39 amending section 60 (*Content of instrument creating an enduring power of attorney*)
- Head 40 amending section 61 (*Notice of execution of an enduring power of attorney*)
- Head 43 amending section 66 (*Disqualification of attorney*)
- Head 44 amending section 67 (*Function of court prior to registration*)
- Head 45 amending section 68 (*Application for registration of instrument creating enduring power*)
- Head 46 to amend section 69 (*Registration of an instrument creating an enduring power of attorney*)
- Head 47 deleting section 70 (*Effect and proof of registration*)
- Head 48 amending section 71 (*Objections to registration*)
- Head 49 amending section 72 (*Register of Enduring Powers*)
- Head 50 amending section 73 (*Revocation and variation of enduring power*)
- Head 51 amending section 74 (*Disclaimer by attorney*)
- Head 52 amending section 75 (*Reports by attorney*)
- Head 54 amending section 77 (*Applications to court*)

- Head 56 inserting a new section 78A (*Notification to Director that donor lacks capacity in relation to one or more relevant decisions that are subject of enduring power of attorney*)
- Head 59 amending section 80 (*Offences in relation to enduring powers of attorney*) of the Act of 2015.

Head 59 Amendment of section 80 of Act of 2015

Offences in relation to enduring powers of attorney

Provide that

Section 80 of the Act of 2015 is amended

by the substitution of the following for subsection (2)

“(2) A person who, in an instrument creating an enduring power of attorney, in an application for registration of an enduring power of attorney, or in connection with such an application or with notifying the Director that a donor lacks capacity in relation to one or more of the relevant decisions which are the subject of the power, makes a statement which he or she knows to be false in a material particular commits an offence and shall be liable” for “A person who, in an instrument creating an enduring power of attorney, in an application for registration of an enduring power of attorney, or in connection with such an application, makes a statement which he or she knows to be false in a material particular commits an offence and shall be liable.”.

Explanatory Note:

The proposed amendments to the process for Enduring Powers of Attorney (EPAs) under the 2015 Act means that these enduring powers of attorney will be registered with the Director of the Decision Support Service at the point of execution so that the donor, before he or she loses capacity, can make, vary and revoke an EPA instrument and respond to queries or clarifications in relation to the intended scope or powers in the instrument that might arise through an objection or through a review by the DSS. The attorney will notify the Director at a later date if the donor loses capacity and the EPA will then come into force.

This Head provides for an offence where a person makes a false statement when notifying the Director that the relevant person lacks capacity. This amendment to

section 80 (*Offences in relation to enduring powers of attorney*) of the Act of 2015 is required because of the proposed new two stage process of registration followed by notification of an EPA.

The proposed introduction of a two-stage EPA process will require the amendment of a number of other sections in the Act of 2015 including

- Head 8 amending section 13 (*Disqualification as decision-making assistant*)
- Head 14 amending section 20 (*Nullity*)
- Head 24 amending section 40 (*Disqualification as decision-making representative*)
- Head 39 amending section 60 (*Content of instrument creating an enduring power of attorney*)
- Head 40 amending section 61 (*Notice of execution of an enduring power of attorney*)
- Head 43 amending section 66 (*Disqualification of attorney*)
- Head 44 amending section 67 (*Function of court prior to registration*)
- Head 45 amending section 68 (*Application for registration of instrument creating enduring power*)
- Head 46 to amend section 69 (*Registration of an instrument creating an enduring power of attorney*)
- Head 47 deleting section 70 (*Effect and proof of registration*)
- Head 48 amending section 71 (*Objections to registration*)
- Head 49 amending section 72 (*Register of Enduring Powers*)
- Head 50 amending section 73 (*Revocation and variation of enduring power*)
- Head 51 amending section 74 (*Disclaimer by attorney*)
- Head 52 amending section 75 (*Reports by attorney*)
- Head 54 amending section 77 (*Applications to court*)
- Head 56 inserting a new section 78A (*Notification to Director that donor lacks capacity in relation to one or more relevant decisions that are subject of enduring power of attorney*)
- Head 58 inserting a new section 79A (*Matters to be specified by the Director in relation to enduring powers of attorney*)

Head 60 Amendment of section 82 of Act of 2015

Provide that

Section 82 of the Act of 2015 is amended by the deletion of the definition of “treatment”.

Explanatory Note

This Head proposes to delete the definition of “treatment” in section 82 (*Definitions – Part 8*) of the Act of 2015 as the term is also used outside of Part 8. The definition of “treatment” is instead proposed to be provided for in section 2 (*Interpretation - general*) of the Act of 2015 (Head 3).

The policy intention is to exclude treatment decisions from EPAs and to include treatment decisions only in AHDs. Head 38, which amends section 59 (*Enduring power of attorney – general*), includes a new provision as follows:

“(7)(a) Where an enduring power of attorney confers authority in relation to personal welfare, the power does not authorise an attorney to consent to or refuse treatment.

(b) To the extent that an enduring power of attorney includes a relevant decision specified in paragraph (a), the power shall be null and void.”.

This replaces sections 62(5) and (6) (*Scope of Authority – personal welfare decisions*) which are proposed to be deleted in Head 41. The subsections to be deleted provide as follows:

“(5) A donor shall not, in an enduring power of attorney, include a relevant decision-

(a) relating to refusal of life-sustaining treatment, or

(b) which is the subject of an advanced healthcare directive made by him or her.

(6) To the extent that an enduring power of attorney includes a relevant decision specified in subsection (5), the power shall be null and void.”

This Head provides for an amendment to Part 8 (*Advance Healthcare Directive*) of the Act of 2015. Commencement of the provisions of Part 8 is a matter for the Minister for Health.

Head 61 Amendment of section 92 of Act of 2015 ²²

Provide that:

Section 92 of the Act of 2015 is amended, in subsection (3), by the substitution of the following for paragraph (h):

“(h) an attorney or attorney under the Act of 1996 for the directive-maker,”.

Explanatory Note:

This Head provides for an amendment to section 92 (*Persons who may make applications to relevant court under this Part, etc.*) of the Act of 2015 to clarify that an attorney under the Act of 1996 may make an application to the court under Part 8 in relation to an advance healthcare directive without first seeking the approval of the court.

Responsibility for commencement of Part 8 (*Advance Healthcare Directives*) lies with the Minister for Health.

Currently under the 2015 Act the following people can make an application to the court under Part 8 without first seeking the approval of the court:

- a. the directive-maker
- b. the Director
- c. a spouse or civil partner of the directive-maker
- d. the cohabitant of the directive-maker
- e. a decision-making assistant for the directive-maker
- f. a co-decision-maker for the directive-maker
- g. a decision-making representative for the directive-maker
- h. an attorney for the directive-maker
- i. a designated healthcare representative for the directive-maker
- j. a person specified for that purpose in an existing order of the court under this Part where the application relates to that order.

An attorney appointed under an enduring power under the Powers of Attorney Act 1996 is not included in this list. It is considered that such attorneys should be included as they provide a similar service (to a relevant person) as an attorney appointed under the Act of 2015. A similar amendment is included in Head 23 in relation to Section 36 (*Persons who may make applications to court under this Part, etc.*).

²² The drafting of this amendment was approved by the previous Government for introduction at Dáil Report Stage of the lapsed Disability (Miscellaneous Provisions) Bill 2016.

Head 62 Amendment of section 95 of Act of 2015

Provide that:

Section 95 of the Act of 2015 is amended—

(a) in subsection (1)(k), by the substitution of “Act; and” for “Act.”

(b) in subsection (1), by the insertion of the following after paragraph (k)

“(l) to promote the safeguarding and welfare of relevant persons by sharing information, including sensitive personal information where appropriate, with relevant organisations and bodies where such concerns arise.”

(b) by the substitution of the following for subsection (5)

“(5) In carrying out his or her functions, the Director may

- (a) consult with any person who has any functions in relation to the care or treatment of a relevant person,
- (b) request information relating to the carrying out of functions under this Act from decision-making assistants, co-decision-makers, decision-making representatives, attorneys or relevant persons,
- (c) request information from a person proposed as a decision-making assistant, co-decision-maker or attorney.

(6) The Minister may prescribe by regulations the data processing and data sharing arrangements that shall apply in respect of the performance of the Director’s functions.”.

Explanatory Note:

This Head proposes amendments to section 95 (*Functions of Director*) of the Act of 2015.

The insertion of a new subsection (1)(l) is to give the Director a specific statutory function to enable the sharing of information between the Director and other public or private entities where concerns regarding the welfare or safeguarding of a relevant person arise. This is chiefly to enable the sharing of data where, in the course of its ordinary business, the Decision Support Service becomes aware of a potential cause for concern and wishes to follow up on the issue, either by forwarding information to the relevant authorities (such as the HSE or An Garda Síochána) or where the Director seeks access to information that would enable him or her to confirm or allay a suspicion regarding the behaviour of a decision supporter or the welfare and safeguarding of a relevant person.

The Act of 2015 is prescriptive as to when the Director may request information from decision supporters and relevant persons. The proposed substitution of subsection (5) gives the Director discretion to request information in order to carry out his or her functions.

The insertion of a new subsection (6) gives the Minister the power to make regulations for the sharing of data by the Director of the Decision Support Service. This is considered necessary for the avoidance of doubt, in order to ensure that there will always be a sufficient statutory basis for the sharing of information by the Director and is considered particularly prudent in light of the new function being added by subsection (1)(l), which may entail the sharing of information of a sensitive nature and which may require specific lawful authority.

DRAFT

Head 63 Amendment of section 96 of Act of 2015

Provide that:

Section 96 of the Act of 2015 is amended—

(a) by the substitution of the following for subsection (1):

“(1) The Director may investigate, either on his or her own initiative or in response to a complaint made to him or her by any person—

(a) any action of a decision-making assistant, co-decision-maker, decision-making representative or attorney for a relevant person which may involve a breach of his or her functions as decision-making assistant, co-decision-maker, decision-making representative, or attorney, as the case may be, or a breach of a provision of this Act,

(b) matters specified in sections 15(1), 30(1), 47(1), 76(1) and 76(2) in relation to any person

(c) complaints in relation to a designated healthcare representative as specified in section 88(4)(a)”

(b) by the substitution of the following for subsection (7)(b):

“(b) hinders or obstructs—

(i) the Director in the performance of his or her functions under this section, or

(ii) one or more of the Director’s staff duly authorised to act on behalf of the Director in the performance of the Director’s functions under this section

shall be guilty of an offence and shall be liable on summary conviction to a class A fine.”.

(c) by the insertion of the following after subsection (7):

“(8) The Director may, if he or she thinks fit, pay to a witness summoned to attend before the Director under subsection (2)—

(a) sums in respect of travelling and subsistence expenses properly incurred by the witness, and

(b) allowances by way of compensation for loss of his or her time,

of such amount as may be determined by the Minister with the approval of the Minister for Public Expenditure and Reform.

(9) Complaints shall be made within 12 months of the incident or knowledge of the incident. The Director may admit late complaints at his or her

discretion. A late complaint not accepted by the Director can be appealed to the Court not later than 21 days after the date of issue of the Directors decision.”.

Explanatory Note:

It is considered that section 96(1) (*Investigations by Director*) of the Act of 2015, as currently drafted, relates only to the investigation of complaints against the five named ‘decision supporters’ for any action involving a breach of functions or a provision of the Act. This Head provides that the Director may investigate a complaint in relation to persons other than decision-making assistants, co-decision-makers, decision-making representatives and attorneys.

Section 96(2) sets out the investigative powers on which the Director of the Decision Support Service may rely in exercise of his or her functions under section 96(1). However, other sections in the Act (section 15 (*Complaints in relation to decision-making-assistants*), section 30 (*Complaints in relation to co-decision-makers*), section 47 (*Complaints in relation to decision-making representatives*) and section 76 (*Complaints in relation to attorneys*)) provide for investigation of other complaints and matters, which would not, therefore, be covered by the investigative powers in section 96(2).

For example, section 15 (*Complaints in relation to decision-making assistants*), section 30 (*Complaints in relation to co-decision-makers*), section 47 (*Complaints in relation to decision-making representatives*) and section 76 (*Complaints in relation to attorneys*) of the Act of 2015 provides that any person may make a complaint on certain grounds as set out in those sections. The Director is required to investigate such complaints. Although the heading of each of these sections refers to complaints in relation to decision-making assistants, co-decision-makers and attorneys, the matter complained of may not in fact relate to the actions of these particular decision supporters. Some complaints could, for example, relate to a third party (e.g. a complaint that fraud, coercion or undue influence was used to induce the person to enter into the agreement). In relation to co-decision-makers, all of the grounds for complaints at section 30(1) (c) to (g) could relate to the activities of someone other than the co-decision-maker.

The amendment also provides for complaints in relation to Designated Healthcare Representatives in order that the Director can rely on the provisions of section 96 when investigating complaints in relation to DHRs.

It is proposed to amend section 96(1) to ensure that section 96 will apply in all these situations.

It is proposed to remove the second reference to “complaints” from section 96(1) to ensure that there is no doubt about the applicability of section 96 where an issue that comes to the attention of the Director, other than by way of a complaint, needs to be investigated.

The purpose of the proposed amendment to section 96(7)(b) is to clarify the application of that provision.

The purpose of the proposed new subsection (8) is to provide for the making of payments, as the Director considers appropriate, in respect of travel and subsistence expenses properly incurred by witnesses summoned to attend before the Director for the purposes of an investigation, and allowances by way of compensation for loss of time of such amounts as may be determined by the Minister. As it would be undesirable for witnesses to be discouraged from attending before the Director on grounds of financial hardship, it is appropriate to include provision for this in the Bill.

The text of the Head draws from similar provisions in other legislation, including section 46 of the Adoption Act 2010 (No. 21) and section 22 of the Official Languages Act 2003 (No.32).

The Head provides for a time limit for bringing complaints that can be waived at the Director's discretion. A late complaint not accepted by the Director can be appealed to the Court.

DRAFT

Head 64 NEW SECTION 96A - Circumstances in which application may be made to court for temporary prohibition order

Provide that:

The Act of 2015 is amended by the insertion of the following section after section 96:

“Circumstances in which application may be made to court for temporary prohibition order

(1) Where the Director considers that an immediate prohibition of a decision-making assistant, co-decision-maker, decision-making representative or attorney for a relevant person from acting as such is necessary because of an immediate risk of harm to the relevant person or the property of the relevant person, he or she may make an application ex parte to the court for a temporary prohibition order under subsection (3).

(2) An application under subsection (1) shall be grounded on an affidavit sworn by or on behalf of the Director.

(3) (a) The court may, on an application under subsection (1), make a temporary prohibition order prohibiting the decision-making assistant, co-decision-maker, decision-making representative or attorney concerned from acting as such for the relevant person concerned where, having regard to the circumstances of the case, the court considers it necessary to do so for the protection of the relevant person or the property of the relevant person.

(b) Without prejudice to subsection (4), where a temporary prohibition order is made under this subsection, the Director shall, as soon as is practicable, serve a copy of the order and of the affidavit referred to in subsection (2) on the decision-making assistant, co-decision-maker, decision-making representative or attorney concerned and on the relevant third parties identified by the Director and approved by the Court.

(c) A temporary prohibition order under this subsection shall have effect for such period as is specified in the order.

(d) any decisions that need to be taken during the time when the temporary prohibition order is in effect can be made by the court, by a decision-making representative appointed by the court, or by another decision supporter already in place for the relevant person.

(4) (a) A temporary prohibition order under subsection (3) shall take effect on notification of its making being given to the decision-making assistant, co-decision-maker, decision-making representative or attorney concerned.

(b) Oral communication to the decision-making assistant, co-decision-maker, decision-making representative or attorney by or on behalf of the Director of the fact that a temporary prohibition order under subsection (3) has been made, together with production of a copy of such order, shall, without prejudice to any other form of notification, be taken to be sufficient notification to the decision-making assistant, co-decision-maker, decision-making representative or attorney concerned of the making of the order.

(5) An application under subsection (1) shall be heard otherwise than in public unless the court considers it appropriate to hear the application in public.”.

Explanatory Note:

This Head proposes to make provision for circumstances where it would be prudent for the Director of the Decision Support Service (DSS) to seek a court order temporarily prohibiting a decision supporter from acting in the role, pending the outcome of an investigation. The Head also provides for orders for the protection of a relevant person’s assets which may become depleted during the course of an investigation.

The text of the Head draws from similar provisions in other legislation, including section 64 of the Property Services Regulation Act 2011 (No. 40), section 179 of the Personal Insolvency Act 2012 (No. 44) and section 134 of the Data Protection Act 2018 (No. 7). In view of the jurisdiction of the Circuit Court to determine most matters arising under the Act of 2015, it is proposed that the Circuit Court should have jurisdiction to deal with applications under this Head, rather than the High Court which has jurisdiction pursuant to similar provisions in other legislation.

The proposed subsection (3)(b) facilitates service of the temporary prohibition order on the relevant decision supporter and on third parties such as banks in order to ensure that such third parties are aware of the circumstances.

The proposed subsection (3)(d) allows for a replacement decision maker to support the relevant person as necessary during the time the temporary prohibition order is in effect.

Head 65 Amendment of section 98 of Act of 2015

Provide that

Section 98 of the Act of 2015 is amended in subsection (7) –

by the substitution of "Minister" for "Minister for Health" and by the substitution of "Decision Support Service" for "Mental Health Commission".

Explanatory Note:

This Head proposes the amendment of section 98 (*Staff of Director of the Decision Support Service*) to provide that it is the Minister for Children, Equality, Disability, Integration and Youth rather than the Minister for Health who may approve specialist adviser pay and that the pay of the specialist advisers comes from the budget of the Decision Support Service and not from the budget of the Mental Health Commission.

Head 66 Amendment of section 99 of Act of 2015²³

Provide that:

Section 99 of the Act of 2015 is amended—

(a) by the substitution of the following for subsection (2)

“(2) A special visitor—

(a) is a registered medical practitioner who has particular knowledge, expertise and experience as respects the capacity of persons and can assist the Director in performing his or her supervisory function referred to in section 95 (1)(e) including investigating complaints and objections, in performing his or her functions under section 96 and in undertaking assessments of capacity where the Director brings an application under Part 5 in relation to a declaration of capacity, or

(b) is a person who, although not a registered medical practitioner, is, in the opinion of the Director, a person who has particular knowledge, expertise and experience as respects the capacity of persons and can assist the Director in performing his or her supervisory function referred to in section 95 (1)(e) including investigating complaints and objections, in performing his or her functions under section 96 and in undertaking assessments of capacity where the Director brings an application under Part 5 in relation to a declaration of capacity.”

(b) by the substitution of the following for subsection (3)

“(3) A general visitor is a person who, in the opinion of the Director, is a person who possesses relevant qualifications, or has other relevant expertise or experience, to assist the Director in performing his or her supervisory function referred to in section 95 (1)(e) including investigating complaints and objections and in performing his or her functions under section 96.”

(ba) in subsection (4) by the substitution of "Minister" for "Minister for Health"

²³ The drafting of this amendment was approved by the previous Government for introduction at Dáil Report Stage of the lapsed Disability (Miscellaneous Provisions) Bill 2016.

(c) by the substitution of the following for subsection (5)

“(5) The Director may direct a special visitor or general visitor to visit—

(a) a decision-making assistant, co-decision-maker, decision-making representative, designated healthcare representative or attorney for a relevant person, or

(b) a relevant person for whom there is a decision-making assistant, co-decision-maker, decision-making representative, designated healthcare representative or attorney, or in respect of whom an order has been made under section 48 ,

(c) any relevant party as specified in the direction from the Director

and, subsequent to the visit, to submit to the Director a report on such matters concerning the person visited as the Director may specify in the direction.”

(d) by the substitution of the following for subsection (8)

“(8) Prior to taking an action pursuant to paragraph (a) of subsection (6), the special visitor or general visitor, as the case may be, shall seek the consent of the relevant person to the taking of such action, unless -

(a) the Director, with the approval of the Court, dispenses with this requirement where—

(i) the relevant person has refused to provide such consent, but the taking of an action pursuant to paragraph (a) of subsection (6) is necessary for the special visitor and general visitor to fulfil his or her functions under this Act, person,

(ii) in the circumstances of the case, it is not practicable for the consent of the relevant person to be obtained,

or

(b) the special visitor or general visitor is assisting the Director in the exercise of his or her powers under section 96(2) and has been duly authorised in writing to do so.”.

Explanatory Note:

The purpose of this Head is to amend section 99 (*Special visitors and general visitors*) of the Act of 2015, which provides for special visitors and general visitors.

It is proposed to amend section 99(2) to clarify that the role of the special visitor is to assist the Director in performing his or her supervisory function referred to in section 95 (1)(e) including investigating complaints and objections, in performing his or her functions under section 96 in relation to investigations and in undertaking assessments of capacity where the Director brings an application under Part 5 in relation to a declaration of capacity.

It is proposed to amend section 99(3) to clarify that the role of the general visitor includes investigating complaints and objections and in assisting the Director with investigations under section 96. A reference to the role of the general visitor in assisting the Director in his or her supervisory functions under section 95(1)(e) was provided for in the 2015 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 Head also provides for the Director to direct a special or general visitor to visit any relevant party under Section 99(5) and not just decision supporters or the relevant person.

It is also proposed to amend section 99(8) to provide for the Director to dispense with the requirement for consent of the relevant person to be sought before a special or general visitor can access health, personal welfare or financial records in circumstances where it would be impracticable to obtain such consent, for example, if the relevant person was in a coma or otherwise unable to communicate. The amendment was updated following Government approval to include a provision that the Director must obtain court approval before dispensing with consent under this section. The intention behind the inclusion of the amended section 99(8)(b) is to provide that court approval is not required in order to allow a special or general visitor to obtain access to documents when that visitor is assisting the Director in carrying out an investigation. This is considered proportionate in the context of safeguarding a relevant person where there is a clear potential issue being reviewed and investigated by the Director – and is envisaged under subsection 8(b), which is distinguished from the slightly different balance of rights in the context of subsection(a)(i) and (ii) which represents a more general supervisory/audit support role.

The provision (currently in section 99(8)(a)) providing for the dispensing with consent if there is a declaration of incapacity is being deleted as the provision goes against the principle of the Act that the assessment of capacity aligns with the decisions needing to be taken. A similar amendment is included in Head 67 in relation to section 100 (*Court friends*).

Head 67 Amendment of section 100 of Act of 2015²⁴

Provide that:

The Act of 2015 is amended in section 100 –

by the substitution of the following for subsection (5)

"(5) Prior to taking an action pursuant to paragraph (a) of subsection (3), the court friend shall seek the consent of the relevant person to the taking of such action, unless the Director, with the approval of the Court, dispenses with this requirement where

(a) the relevant person has refused to provide such consent, but the taking of an action pursuant to paragraph (a) of subsection (3) is necessary for the court friend to fulfil his or her functions under this Act, or

(b) in the circumstances of the case, it is not practicable for the consent of the relevant person to be obtained. "

Explanatory Note:

The purpose of this Head is to amend section 100 (*Court friends*) of the Act of 2015 which provides for court friends.

It is proposed to amend section 100(5) to provide that the Director may dispense with the requirement for consent of the relevant person to be sought before a court friend can access personal welfare or financial records in circumstances where it would be impracticable to obtain such consent, such as, for example, where the relevant person was in a coma or otherwise unable to communicate. The amendment was updated following Government approval to include a provision that the Director must obtain court approval before dispensing with consent under this section. The provision (currently in section 100(5)(a)) providing for the dispensing with consent where there is a declaration of incapacity is being removed as the provision goes against the principle in the Act that an assessment of capacity should align with the decisions needing to be taken. A similar amendment is included in Head 66 in relation to section 99 (*Special visitors and general visitors*).

²⁴ The drafting of this amendment was approved by the previous Government for introduction at Dáil Report Stage of the lapsed Disability (Miscellaneous Provisions) Bill 2016.

Head 68 Amendment of section 101 of Act of 2015 ²⁵

Provide that:

Section 101 of the Act of 2015 is amended by the substitution of the following for paragraph (a):

“(a) decision-making representatives for:

- (i) relevant persons in the circumstances to which section 38(7) applies,
- (ii) former wards in circumstances to which section 55(8) applies,”.

Explanatory Note:

The amendment of section 101 (*Panels to be established by Director*) of the Act of 2015 provided for in this Head is related to the proposed insertion of a new subsection (8) in section 55 (*Declarations following review and discharge from wardship*) (Head 33).

This Head provides for the Director to establish a panel of decision-making representatives from which he or she can nominate a representative to be appointed by the court where there is no suitable person willing to act as a representative for a relevant person or former ward. The Act of 2015 already provides for the panel of decision-making representatives to be used for relevant persons. This amendment will provide that the panel may also be used for former wards.

²⁵ The drafting of this amendment was approved by the previous Government for introduction at Dáil Report Stage of the lapsed Disability (Miscellaneous Provisions) Bill 2016.

Head 69 NEW SECTION 101A of Act of 2015 – Digital signature

Provide that

The Act of 2015 is amended by the insertion of the following after section 100 –

"101A. (1) The Director may specify the form of signature to an agreement, instrument or directive under this Act, including a decision-making assistance agreement, a co-decision-making agreement, an enduring power of attorney instrument or an advance healthcare directive.

(2) The form of signature specified under subsection (1) shall include a signature in electronic format and include both signatures from witnesses and signatories to the agreement, instrument or directive.

Explanatory Note:

This Head inserts a new section 101A (*Digital signature*) into the Act of 2015 to provide that the Director, in line with the digital first policy, may accept e-signatures and also provides for an agreement to be fully electronic. It avoids the need to print down documents drafted electronically for a wet signature or to have to upload such documents again. The Head provides that the Director may specify the form of signature that is acceptable for the purposes of this section.

Related digital first amendments are in Head 28 amending section 45 (*Register of decision-making representation orders*) and Head 73 inserting a new section 142A (*Documents in electronic form and transmission of documents by electronic means*)

Head 70 Amendment of section 102 of Act of 2015

Provide that:

The Act of 2015 is amended in section 102 by the substitution of the following for subsection (2) –

“(2) The Mental Health Commission shall cause a copy of a report submitted to it pursuant to subsection (1) to be forwarded to the Minister for Health and the Minister as soon as may be, but not later than 3 months after the date on which the Commission received the report.”.

Explanatory Note:

This Head proposes an amendment to section 102 (*Reports by Director*) in subsection (2) to change the timeframe for submission by the Mental Health Commission of the annual report of the Director of the Decision Support Service to the Minister for Health. It will enable the Mental Health Commission to ensure that the reporting arrangements align with its overall obligations and reporting requirements to its parent Department, the Department of Health. The timeframe has been changed from 28 days to 3 months. A requirement to submit the report to the Minister for Children, Equality, Disability, Integration and Youth as well as the Minister for Health has also been included.

Head 71 Amendment of section 103 of Act of 2015 ²⁶

Provide that:

Section 103 of the Act of 2015 is amended, in subsection (2)(c)—

(a) by the substitution of the following for paragraph (i):

“(i) the guidance of persons, including healthcare professionals, on supporting decision-making by relevant persons and assessing whether a person lacks capacity in relation to any matter;”

(b) by the substitution of the following for paragraph (viii):

“(viii) the guidance of court friends and committees assisting a ward in court;”

(c) by the substitution of the following for paragraph (xi):

“(xi) the guidance of other persons (including healthcare professionals, legal practitioners, and financial service providers) in relation to their dealings with relevant persons;”.

Explanatory Note:

This Head provides for the amendment of section 103 (*Codes of practice*) of the Act.

The proposed amendment to subsection (2)(c)(i), which is to include the words “on supporting decision-making by relevant persons” seeks to ensure that the first vital steps of facilitating and supporting a relevant person to make a decision are included in the code of practice in relation to the assessment of a person’s capacity. 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 proposed amendment to subsection (2)(c)(viii) includes committees for wards in the code of practice for court friends. Head 32 provides for the amendment of section 54 (*Review of capacity of wards who are adults*) of the Act of 2015 to include the ward’s committee as a person who can make an application to court for a capacity declaration under section 54(1) and also as a person who can assist the relevant person in court before a court friend is needed under section 54(3B).

²⁶ The drafting of this amendment was approved by the previous Government for introduction at Dáil Report Stage of the lapsed Disability (Miscellaneous Provisions) Bill 2016.

The proposed amendments to subsection (2)(c)(xi) substitute “legal practitioner”, which is defined in section 2 (*Interpretation – general*) of the Act, for “legal professional” (not defined in the Act) and include “financial service providers” to ensure clarity relating to codes of practice that will apply to the financial services sector.

The reference to social care professionals is to be removed as such persons are included in the definition of “healthcare professional” in section 2(1) of the Act (“healthcare professional” means a member of any health or social care profession whether or not the profession is a designated profession within the meaning of section 3 of the Health and Social Care Professionals Act 2005) (No. 27).

It is also proposed to replace “acting on behalf of” with “in relation to their dealings with” as this reflects more accurately the purpose of the provision. This amendment to subsection (2)(c)(xi) proposes to replace the words “the guidance of other persons (including healthcare, social care, legal and financial professionals) acting on behalf of the relevant person” with the words “the guidance of other persons (including healthcare professionals, legal practitioners, and financial service providers) in relation to their dealings with relevant persons”.

DRAFT

Head 72 Amendment of section 139 of Act of 2015 ²⁷

Provide that:

The Act of 2015 is amended in section 139

by the insertion of the following subsection after subsection (2):

“(3) Subsection (1) shall, with all necessary modifications, apply to a review under Part 6 by the wardship court of the capacity of a ward as it applies to an application under Part 5, 7 or 8 to the court or High Court in respect of the relevant person the subject of the application.”

Explanatory Note:

This Head amends section 139 (*Applications under Part 5, 7 or 8 to be heard in presence of relevant person or persons concerned*) of the Act of 2015 to 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 Head provides that a ward has the same rights as a relevant person in relation to court proceedings under the Act.

²⁷ The drafting of this amendment was approved by the previous Government for introduction at Dáil Report Stage of the lapsed Disability (Miscellaneous Provisions) Bill 2016.

Head 73 NEW SECTION 142A - Documents in electronic form and transmission of documents by electronic means

Provide that:

The Act of 2015 is amended by the insertion of the following section after section 142:

“142A. Documents in electronic form and transmission of documents by electronic means

(1) In this section—

‘electronic’ includes electrical, digital, magnetic, optical, electro-magnetic, biometric, photonic and any other form of related technology;

‘electronic means’ includes electronic means of transmission of data and other forms of related technology by means of which data is transmitted;

‘relevant document’ means—

- (a) an application, notice, notification, objection or complaint under any provision of this Act,
- (b) any document required to be provided by or to the Director in connection with an application, notice, notification, objection or complaint referred to in paragraph (a),
- (c) a report by or to the Director under any provision of this Act, or
- (d) any other document provided by or to the Director under any provision of this Act.

(2) The Director may direct that a relevant document or class of relevant documents be transmitted by or to him or her by electronic means in such format as the Director may specify.

(3) The Director may transmit or receive a relevant document by electronic means in a format specified under subsection (2).

(4) The Director may exempt a person from the requirements of a direction under subsection (2) where the Director is satisfied that the person could not reasonably be expected to transmit or receive, as the case may be, a relevant document by electronic means.

(5) The Director may certify a copy of—

- (a) a relevant document transmitted or received by the Director by electronic means in accordance with this section, or

(b) a relevant document kept by the Director in electronic form where the document was transmitted or received by the Director otherwise than by electronic means and an electronic copy was made of the document,

to be a true copy of that document.

(6) All documents, electronic or otherwise shall achieve the necessary standards of accessibility.

Explanatory Note:

This Head provides that the Director may direct the transmission to him or her of relevant documents by electronic means and for the certification of such documents as a true copy by the Director. All documents, whether or not they are in electronic format, should achieve the necessary standards of accessible to ensure they are accessible to everyone who has an interest in them. Related digital first amendments are in Head 28 which amends section 45 (*Register of decision-making representation orders*) and Head 69 inserting a new section 101A (*Digital signature*)

DRAFT

Head 74 Amendment of section 143 of Act of 2015²⁸

Provide that:

The Act of 2015 is amended in section 143 –

by the deletion of paragraphs (b) and (d).

Explanatory Note:

Section 143 (*Amendment of Civil Registration Act 2004*) of the Act of 2015 provides for amendment of the Civil Registration Act 2004 (No. 3). Section 143(b) amends section 2(2A) of the Act of 2004 (*Interpretation*) and section 143(d) amends section 59F (*Registration of decrees of divorce and decrees of nullity*) of the Act of 2004.

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.

²⁸ These amendments to section 143 of the Act were brought forward at Committee Stage of the Disability (Miscellaneous Provisions) Bill on 30 January 2019.

Head 75 Deletion of section 144 of Act of 2015

Provide that

The Act of 2015 is amended by the deletion of section 144.

Explanatory Note:

Section 144 of the Act of 2015 provides for an amendment to the Mental Health Act 2001 (No. 25). Section 144 has not been commenced and it is considered that the amendments to sections 17 and 33 of the Act of 2001 which are contained in Section 144 should be more appropriately provided for in the Mental Health Act (Amendment) Bill 2021 rather than in the Act of 2015.

This Head provides for the deletion of section 144.

DRAFT

Head 76 Amendment of section 145 of Act of 2015

Provide that:

The Act of 2015 is amended in section 145 by –

the substitution of “or designated healthcare representative for a relevant person” for “for the relevant person, or designated healthcare representative”.

Explanatory Note:

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.

DRAFT

PART 3 – AMENDMENT OF OTHER ENACTMENTS

Start Head 77 Amendment of Schedule of Freedom of Information Act 2014

Provide that:

Part 1 of Schedule 1 to the Freedom of Information Act 2014 is amended—

(a) by the substitution of “entity;” for “entity.” in subparagraph (iv) of paragraph (am), and

(b) by the insertion after paragraph (am) of the following:

“(an) the Mental Health Commission, insofar as it relates to records in connection with an investigation carried out by the Director of the Decision Support Service under section 96 of the Assisted Decision-Making (Capacity) Act 2015.”.

Explanatory Note:

It is proposed to provide for a partial exemption under the Freedom of Information Act 2014 of all documents and records obtained by the Director of the Decision Support Service as part of the Director’s investigation function. This is similar to the partial exemptions (under Schedule 1, Part 1 of the Freedom of Information Act) covering a number of other public bodies that conduct investigations, such as various Ombudsman offices.

The potential difficulty with including the Decision Support Service in Schedule 1, Part 1 of the Freedom of Information Act 2014 is that the Decision Support Service is not a separate legal entity. The Director of the Decision Support Service is appointed under section 94 of the Assisted Decision-Making (Capacity) Act 2015 and both the Director and his or her staff are members of the staff of the Mental Health Commission which is itself a public body for the purposes of FOI.

However, the FOI provisions relating to the Commissioner for Environmental Information provides a precedent for including an office holder in Schedule 1, Part 1 of the FOI Act. It is proposed that this precedent would be used to provide for an exemption under Schedule 1, Part 1 of the FOI Act for the investigation work of the Director of the Decision Support Service. It is proposed that this precedent would still enable release of Mental Health Commission records and the general administrative records relating to the functions of the Director of the Decision Support Service.

Head 78 Amendment of section 42 of Freedom of Information Act 2014

Provide that

Section 42 of the Freedom of Information Act 2014 is amended by the insertion of the following after paragraph (m) –

“(n) records in connection with an investigation carried out by the Director of the Decision Support Service under section 96 of the Assisted Decision-Making (Capacity) Act 2015.”.

Explanatory Note:

It is proposed to provide for a partial exemption under the Freedom of Information Act 2014 of all documents and records obtained by the Director of the Decision Support Service as part of the Director’s investigation function.

DRAFT

Head 79 Amendment of section 7 of Juries Act 1976²⁹

Provide that:

(1) The Act of 1976 is amended—

(a) in section 7, by the insertion of the following subsection:

“(2) A person who is deaf shall not be ineligible for jury service by reason only of his requiring the services of a sign language interpreter for the purpose of enabling him to perform the duties of juror effectively.”,

and

(b) under the heading “*Other persons*” in Part I of the First Schedule, by the substitution of “A person who does not, in the opinion of the court, have sufficient mental or intellectual capacity to serve as a juror.” For “A person who suffers or has suffered from mental illness or mental disability and on account of that condition either—

(a) is resident in a hospital or other similar institution, or

(b) regularly attends for treatment by a medical practitioner.”.

(2) The text of section 7 (other than subsection (2)) of the Act of 1976 shall be described as subsection (1) of that section.

(3) In this section “Act of 1976” means the Juries Act 1976.

Explanatory Note:

This Head 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.

²⁹ Section 1(*Amendment of Juries Act 1976*) of Disability(Miscellaneous Provisions) Bill 2016 – lapsed 2020

It is intended in this Head to provide a statutory right for deaf people to sit on juries. While the Courts Service has accommodated deaf people to sit on juries, this is subject to the circumstances of individual courts rather than a standard practice. This Head would require the Courts Service to make provision for deaf people to sit on juries as a standard provision. The Courts Service would have to ensure that it had access to sign language interpreters or braille or other accommodations for specific deaf jurors on an ongoing basis. The Courts Service is aware of the additional resource requirements that will arise if this provision is retained in the General Scheme and subsequently enacted.

In addition, the amendments in Part 6 of the Civil Law (Miscellaneous Provisions) Act 2008 responding to the successful action securing the right of deaf persons to sit on juries which replaced “A person who because of insufficient capacity to read, deafness or other permanent infirmity is unfit to serve on a jury” with “Persons who have (a) an incapacity to read, or (b) an enduring impairment, such that it is not practicable for them to perform the duties of a juror” were not considered effective. A further action in November 2010 secured the right for a deaf person to sit on a jury and to have a sign language interpreter present. This provision is intended to respond to the court decision confirming the right of deaf persons to sit on juries.

Head 80 Amendment of section 41 of Electoral Act 1992³⁰

Provide that:

Section 41 of the Electoral Act 1992 is amended by the deletion of paragraph (i).

Explanatory Note:

This Head replicates section 2 (*Amendment of Electoral Act 1992*) of the lapsed Disability (Miscellaneous Provisions) Bill 2016 and provides for an amendment of the Electoral Act 1992 (No. 23) to repeal the prohibition on 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).

The current provision under section 41 (*Disqualification for Membership of Dáil*) is:

41.—A person who—

- (a) is not a citizen of Ireland, or
- (b) has not reached the age of 21 years, or
- (c) is a member of the Commission of the European Communities, or
- (d) is a Judge, Advocate General or Registrar of the Court of Justice of the European Communities, or
- (e) is a member of the Court of Auditors of the European Communities, or
- (f) is a member of the Garda Síochána, or
- (g) is a wholetime member of the Defence Forces as defined in section 11 (4), or
- (h) is a civil servant who is not by the terms of his employment expressly permitted to be a member of the Dáil, or
- (i) is a person of unsound mind, or
- (j) is undergoing a sentence of imprisonment for any term exceeding six months, whether with or without hard labour, or of penal servitude for any period imposed by a court of competent jurisdiction in the State, or
- (k) is an undischarged bankrupt under an adjudication by a court of competent jurisdiction in the State,

shall not be eligible for election as a member, or, subject to section 42 (3), for membership, of the Dáil.

³⁰ Section 2 (*Amendment of Electoral Act 1992*) of Disability(Miscellaneous Provisions) Bill 2016 – lapsed 2020

Head 81 Amendment of National Disability Authority Act 1999³¹

Provide that:

(1) The Act of 1999 is amended—

(a) in section 8(2),

by the insertion of the following paragraph after paragraph (c):

“(cc) to provide information and advice to the Irish Human Rights and Equality Commission, at intervals to be agreed, including the development and provision of statistical information if required, in order to assist it in carrying out its functions under section 10(2)(p) of the Irish Human Rights and Equality Commission Act 2014, as it relates to the United Nations Convention on the Rights of Persons with Disabilities.

(b) in section 27—

(i) by the insertion of the following subsection after subsection (1):

“(1A) A member of staff (other than a member of staff to whom section 27A applies) appointed to the Authority after the date of commencement of this section shall be a civil servant in the Civil Service of the State.”,
and

(ii) by the insertion of the following subsection after subsection (2):

“(2A) The Authority shall be the appropriate authority (within the meaning of the Civil Service Commissioners Act 1956 and the Civil Service Regulation Acts 1956 to 2005) in relation to its officers.”,

³¹ Section 3 (*Provisions regarding National Disability Authority Act 1999*) of Disability(Miscellaneous Provisions) Bill 2016 – lapsed 2020

and

(c) by the insertion of the following section after section 27:

“Further provisions regarding staff of Authority

27A. (1) (a) A person who immediately before the appointed day was a member of the staff of the Authority shall, on that day, continue to be a member of the staff of the Authority and shall hold a position in the Civil Service of the State.

(b) The Director of the Authority shall, on the appointed day, hold a position in the Civil Service of the State.

(2) Save in accordance with a collective agreement negotiated with a recognised trade union or staff association and approved by the Minister with the consent of the Minister for Public Expenditure and Reform, a person referred to in subsection (1) shall on the appointed day be subject to such terms and conditions of service, including terms and conditions relating to remuneration, as are not less favourable than the terms and conditions of service, including terms and conditions relating to remuneration, to which the person was subject immediately before that day.

(3) The previous service in the Authority of a person referred to in subsection (1) shall be reckonable for the purposes of, but subject to any exceptions or exclusions in:

- (a) the Redundancy Payments Acts 1967 to 2014;
- (b) the Protection of Employees (Part-Time Work) Act 2001;
- (c) the Protection of Employees (Fixed-Term Work) Act 2003;
- (d) the Organisation of Working Time Act 1997;
- (e) the Terms of Employment (Information) Acts 1994 to 2014;
- (f) the Minimum Notice and Terms of Employment Acts 1973 to 2005;
- (g) the Unfair Dismissals Acts 1977 to 2015;
- (h) the Maternity Protection Acts 1994 and 2004;
- (i) the Parental Leave Acts 1998 and 2006;

- (j) the Adoptive Leave Acts 1995 and 2005;
- (k) the Carer's Leave Act 2001;
- (l) the Paternity Leave and Benefit Act 2016.

(4) Subject to subsection (5), any superannuation benefits awarded to or in respect of a person referred to in subsection (1) and the terms relating to those benefits shall be no less favourable than those applicable to or in respect of that person immediately before the appointed day.

(5) Subsection (4) shall not apply in respect of a provision in a scheme or arrangement in relation to superannuation in respect of which the consent or approval of the Minister for Finance, the Minister for Public Expenditure and Reform or any other Minister of the Government was required by or under any enactment but not obtained.

(6) The pension payments and other superannuation liabilities of the Authority in respect of the persons referred to in subsection (1) become on the appointed day the liabilities of the Minister for Public Expenditure and Reform.

(7) A person referred to in subsection (1) shall be subject to and employed in accordance with the Civil Service Regulation Acts 1956 to 2005 and the Ethics in Public Office Acts 1995 and 2001.

(8) The Minister may make—

(a) an order appointing a day to be the appointed day for the purposes of this section, or

(b) one or more orders appointing different appointed days for the purposes of this section in respect of different categories or grades of the staff of the Authority to whom subsection (1) applies, and in such case, a reference in this section to "appointed day" in relation to a person means the day appointed under this paragraph in respect of the category or grade of staff to which the person belongs".

(9) In this section—

‘appointed day’ shall be construed in accordance with subsection (8);

‘recognised trade union or staff association’ means a trade union or staff association recognised by the Minister for the purposes of negotiations which are concerned with the remuneration or conditions of employment, or the working conditions of employees.”.

(2) (a) The National Disability Authority shall not, from the date of commencement of this subsection, make a scheme under section 28(1) of the Act of 1999.

(b) *Paragraph (a)* shall not affect the validity of any scheme made under section 28(1) of the Act of 1999 before the date of commencement of this subsection.

(3) In this section “Act of 1999” means the National Disability Authority Act 1999.

Further provisions regarding retired staff of Authority

27B. (1) A person who immediately before the appointed day was a retired or deceased member of the staff of the Authority shall, on that day, hold a position as a retired or deceased member of the Civil Service of the State.

(2) Subject to subsection (3), any superannuation benefits awarded to or in respect of a person referred to in subsection (1) and the terms relating to those benefits shall be no less favourable than those applicable to or in respect of that person immediately before the appointed day.

(3) Subsection (2) shall not apply in respect of an arrangement in relation to superannuation in respect of which the consent or approval of the Minister for Finance, the Minister for Public Expenditure and Reform or any other Minister of the Government was required by or under any enactment but not obtained.

(4) The pension payments and other superannuation liabilities of the Authority in respect of the persons referred to in subsection (1) become on the appointed day the liabilities of the Minister for Public Expenditure and Reform.

Explanatory Note:

This Head replicates section 3 (*Provisions regarding National Disability Authority Act 1999*) of the lapsed Disability (Miscellaneous Provisions) Bill 2016 and provides for three 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 and provides that staff of the Authority become civil servants of the State.

In relation to the first amendment providing for the NDA to assist the IHREC in its monitoring role of the UNCRPD at 1(a) above the reference to the IHREC Act became incorrect due to a change in Head 85 below (*Amendment of Irish Human Rights and Equality Commission Act 2014*) when an amendment was moved from 10(2)(hh) to 10(2)(p). The correct reference is 10(2)(p) and has been inserted in the amendment above.

Additional clarification has been included to provide that the assistance the NDA will give to the IHREC will be related to the United Nations Convention on the Rights of Persons with Disabilities and provided at intervals to be agreed between the NDA and IHREC through a MoU following commencement of the legislation.

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. This is a serious burden for a small body with a relatively small financial 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.

The third amendment providing for retired NDA staff to be paid their pension by DPER is required to end the NDA carrying the pension liability. However, before this amendment can be commenced the current pension scheme of the NDA must be approved by DPER.

Head 82 Amendment of Equal Status Act 2000³²

Provide that:

Section 4 of the Equal Status Act 2000 is amended by the insertion of the following subsection after subsection (2):

“(2A) (a) Notwithstanding subsection (2), insofar as—

(i) a body referred to in paragraphs (a) to (g) of the definition of ‘public body’ in section 2(1) of the Irish Human Rights and Equality Commission Act 2014 is a provider of a service,

(ii) a society registered as a credit union under the Credit Union Act 1997, including a society deemed to be so registered by virtue of section 5(3) of that Act, is a provider of a service to which that Act applies,

(iii) an institution or financial institution, within the meaning of the European Union (Capital Requirements) Regulations 2014 (S.I. No. 158 of 2014), is a provider of a service to which those Regulations apply,

(iv) an insurance undertaking within the meaning of the European Union (Insurance and Reinsurance) Regulations 2015 (S.I. No. 485 of 2015) is a provider of a service to which those

Regulations apply,

(v) a person is a provider of a service that is the subject of regulation by the Commission for Communications Regulation pursuant to the performance of its functions under section 10(1) of the Communications Regulation Act 2002, or

(vi) a public transport operator within the meaning of the Dublin Transport Authority Act 2008 who is providing a public passenger transport service, is a provider of a service,

³² Section 4 (*Amendment of Equal Status Act*) of the Disability (Miscellaneous Provisions) Bill 2016 – lapsed in 2020

a refusal or failure to provide the special treatment or facilities to which subsection (1) refers shall not be deemed reasonable unless such provision would impose a disproportionate burden on the provider of the service in question.

(b) For the purposes of this subsection, in determining whether the provision of special treatment or facilities to which subsection (1) refers would impose a disproportionate burden, account shall be taken, in particular, of—

- (i) the financial and other costs entailed,
- (ii) the scale and financial resources of the service provider, and
- (iii) the possibility of obtaining public funding or other assistance.”.

Explanatory Note

This Head replicates section 4 (*Amendment of Equal Status Act 2000*) of the lapsed Disability (Miscellaneous Provisions) Bill which amends section 4 of the Equal Status Act 2000 (No.8) to provide that a service provider must do all it reasonably can to facilitate people with disabilities. Failure or a refusal to take such measures shall be considered discriminatory. However, if the provision of such services gives rise to a disproportionate burden then it shall be considered reasonable not to provide special treatment or services.

The UN CRPD provides that reasonable accommodation (i.e. practical help to ensure that the person with a disability can, for example, access a service) be provided for people with disabilities in the areas of employment and provision of services, provided the cost does not exceed a disproportionate burden.

It is considered that not exceeding a disproportionate burden standard is appropriate in the case of commercial bodies whose activities are regulated for quality of service, namely banks, insurance companies, telecommunications and transport providers, and credit unions. The provision of the higher standard in the case of the remaining private sector providers (shops, restaurants etc.) is not provided for here.

The Supreme Court decided in the Article 26 referral of the Employment Equality Bill 1996 that it would be unconstitutional to impose such a requirement where the cost exceeds a nominal cost. The Supreme Court decision hinges on the private property protection provisions of the Constitution. Clearly, these do not arise in relation to provision of public services. The *not exceeding a disproportionate burden standard* is also permissible in the case of commercial bodies whose activities are regulated for quality of service, viz. banks, insurance companies, telecommunications and transport providers, and credit unions. The

provision of the *not exceeding a disproportionate burden standard* in the case of the remaining private sector providers does face a constitutional impediment, but can be considered in the light of developments in relation to EU anti-discrimination legislation and will need to be subject in the interim to a reservation.

DRAFT

Head 83 Amendment of section 46 of Disability Act 2005³³

Provide that:

Section 46 of the Disability Act 2005 is amended –

in subsection (3), by the substitution of

“members, within the meaning of section 3(1) of the Garda Síochána Act 2005, of the Garda Síochána” for “the Garda Síochána”.

Explanatory Note:

This Head replicates section 5 (*Amendment of Disability Act 2005*) of the lapsed Disability (Miscellaneous Provisions) Bill 2016 which sought 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).

³³ Section 5 (*Amendment of Disability Act 2005*) of the Disability (Miscellaneous Provisions) Bill 2016 – lapsed in 2020.

Head 84 Amendment of section 47 of Disability Act 2005³⁴

Provide that:

Section 47 of the Disability Act is amended by the substitution of the following for subsection (4) –

“(4) If no compliance targets stand prescribed under subsection (3) in relation to a public body, the body shall ensure, unless there is good reason to the contrary, that—

(a) for the period from the date of commencement of *section XXX of the Assisted Decision Making (Capacity) (Amendment) Act 2021* up to and including 31 December 2023, not less than 4.5 per cent of the persons employed by it are persons with disabilities,

(b) for the period from 1 January 2024 up to and including 31 December 2024, not less than 6 per cent of the persons employed by it are persons with disabilities.”

Explanatory Note:

This Head provides for an amendment to section 47 of the Disability Act 2005 for the purpose of ensuring that, unless there is good reason to the contrary, and unless otherwise prescribed, from date of commencement of relevant provision up to end of 2023 4.5% of persons employed in a public body are persons with disabilities and that 6% of persons employed in a public body in 2024 will be of people with disabilities.

This is a modification of the provision previously included as a committee amendment to section 5 of the lapsed Disability (Miscellaneous Provisions) Bill 2016 but updated to take account of the passage of time which prevents the original timelines being used in this provision. The original timelines and percentage of the persons employed that were to be persons with disabilities were:

- From commencement up to and including 31 December 2019 3%
- From 1 January 2020 up to and including 31 December 2021 4%
- From 1 January 2022 up to and including 31 December 2023 5%
- On and from 1 January 2024 6%.

³⁴ This is a modification of the provision previously included as a committee amendment to section 5 of the lapsed Disability (Miscellaneous Provisions) Bill 2016 but updated to take account of the passage of time which prevents the original timelines being used in this provision.

Head 85 Amendment of Irish Human Rights and Equality Commission Act 2014³⁵

Provide that:

The Irish Human Rights and Equality Commission Act 2014 is amended—

(a) in section 10(2)—

(i) by the substitution, in paragraph (e), of the words “the High Court, the Court of Appeal or the Supreme Court” for “the High Court or the Supreme Court” wherever they occur, and

(ii) by the insertion of the following paragraph after paragraph (o):

“(p) to act as the independent mechanism to promote and monitor the implementation into Irish law of the Convention on the Rights of Persons with Disabilities done at New York on 13 December 2006.”

(b) in section 18—

(i) in subsection (1)—

(I) by the substitution, in paragraph (a), of “functions,” for “functions, and”, and

(II) by the insertion of the following paragraph after paragraph (a):

“(aa) without prejudice to the generality of paragraph (a), appoint an advisory committee to assist and advise it on matters relating to its functions under section 10(2)(p)”, and”,

and

(ii) by the insertion of the following subsection:

“(3A) In the case of an advisory committee referred to in subsection (1)(aa), at least half of the number of persons appointed under subsection (3) shall

³⁵ Section 6 (*Amendment of Irish Human Rights and Equality Commission Act 2014*) of the Disability (Miscellaneous Provisions) Act 2016 – lapsed in 2020

have, or have had, a disability within the meaning of section 2(1) of the Disability Act 2005.”.

Explanatory Note:

This Head replicates section 6 (*Amendment of Irish Human Rights and Equality Commission Act 2014*) of the lapsed Disability (Miscellaneous Provisions) Bill 2016 (No. 14) which provided for two amendments to the Irish Human Rights and Equality Commission Act 2014. The Head 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 IHREC’s role in the monitoring framework in relation to the UN CRPD.

DRAFT

Head 86 Amendment of Social Welfare Consolidation Act 2005

To provide:

Section 244(1) of the Social Welfare Consolidation Act 2005 is amended,

(a) by the insertion, after paragraph (a) of the following:

“(aa) for –

(i) enabling a person who is or is likely soon to become unable for the time being to manage his or her own financial affairs

(a) to nominate, with the assistance of

(I) a decision-making assistant appointed in accordance with the Assisted Decision-Making (Capacity) Act 2015, or

(II) a co-decision maker appointed in accordance with the Assisted Decision-Making (Capacity) Act 2015

another person to be appointed to exercise any right or power otherwise exercisable under this Act by the claimant or beneficiary, and

(b) authorise a person so appointed to receive and deal with any sum payable by way of benefit on behalf, and for the benefit, of the claimant or beneficiary,”

(c) Statements provided for in Section 21(4)(f) of the Assisted Decision-Making (Capacity) Act 2015 shall accompany the nomination made under subsection (aa)(i)(II)

and

(b) in paragraph (b)

by the insertion of “taking into consideration paragraph (aa),” before the words “enabling a person to be appointed

Explanatory Note

The purpose of this amendment is to ensure that there is congruence between the Social Welfare Consolidation Act 2005 (No.26) and the Act of 2015 in respect of the circumstances in which a person is deemed to lack capacity.

The existing legislative provisions in the Social Welfare Consolidation Act 2005 empowers the Minister for Social Protection to make regulations to appoint a person to act on behalf of a recipient or beneficiary of social welfare payments in circumstances where the recipient or beneficiary is certified by a registered medical practitioner to be a person who is, or is likely soon to become, unable for the time being to manage his or her own financial affairs.

The Act of 2015 sets out guiding principles that are intended to safeguard the autonomy and dignity of the person with impaired capacity. In order that the social protection arena takes full account of those principles, it is necessary to explicitly reference the Assisted Decision-Making (Capacity) Act 2015 in Section 244 (*Payment to persons other than claimant or beneficiary*) of the Social Welfare Consolidation Act 2005.

Any necessary consequential amendments to existing Regulations made under Section 244(b)(i)(II) of the Social Welfare Consolidation Act 2005 will be introduced as soon as possible after enactment.

The Head provides for the insertion of a new subsection which explicitly provides for the making of regulations in cases where a claimant or beneficiary appoints a person to deal with any sum payable by way of benefit with the support of a “decision-making assistant” or a “co-decision maker” appointed under the provisions of the Act of 2015”.

Head 87 Amendment of PART 4 of the Nursing Homes Support Scheme Act 2009

Provide that:

Part 4 of the Nursing Homes Support Scheme Act 2009 is amended by the substitution of the following for Part 4 –

“Part 4 Care representative in case of person not having full capacity.

21.— (1) This section applies to the following matters:

- (a) the making of an application for ancillary State support,
- (b) consenting to the creation of a charge in relation to an interest in land situated within the State,
- (c) taking necessary actions in connection with the application for ancillary State support, the making of an order under *section 17(2)* or the registration of such order in the Land Registry or the Registry of Deeds (including the perfection of the title of the person to whom the application relates).

(2) It shall be presumed that a person who is receiving care services can make their own decisions in relation to the matters specified in subsection (1) including with the support of a decision-making assistant or a co-decision-making assistant appointed under the Assisted Decision-Making (Capacity) Act 2015 unless a decision-making representation order or enduring power of attorney is in place in relation to these matters.

(3) For the purposes of this Act a care representative for persons receiving care services who do not have capacity to make the decisions specified in subsection (1) means –

- (a) a decision-making representative or attorney appointed under the Assisted Making (Capacity) Act 2015, or
- (b) an attorney under the Powers of Attorney Act 1996 where the power to make the decisions specified in subsection (1) have been conferred on them and the agreement has been registered and activated with the Decision Support Service

(4) The Executive shall be entitled to deal with a care representative as if that care representative were the person in respect of whom he or she has been appointed and that such person had full legal capacity.

(5) Where a care representative ceases to be a care representative they shall notify the Executive within 10 working days of such cesser.

22.— The following paragraph of the Second Schedule to the Courts and Court Officers Act 1995 is repealed:

“(xxxvi) An order for the appointment of a care representative under *section 21* of the *Nursing Homes Support Scheme Act 2009* if no objection is made to the Court relating to that appointment by any notice party to the application.”.

Explanatory Note:

This Head provides for an amendment to Part 4 of the Nursing Homes Support Scheme Act 2009 (No. 15) for the purpose of removing the appointment of Care Representatives under the Nursing Home Support Scheme Act 2009 and instead allowing the decision supporters appointed under the Assisted Decision-Making (Capacity) Act 2015 to perform that role. The amendment avoids the unnecessary duplication of decision-making representatives for the relevant person. The functions of a care representative are not affected.

Part 4 - MISCELLANEOUS

Head 88 Review of Act of 2015

Provide that

“The Minister shall, in consultation with the Minister for Health, cause a review of the functioning of the Act of 2015 (other than *Part 8*) to be carried out before the 5th anniversary of the date of commencement of all sections of this Act.”

Explanatory Note:

This Head provides for a review of the Act of 2015 to be carried out by the Minister, in consultation with the Minister for Health, within 5 years of the date of commencement of all sections of this Bill.

DRAFT