Submission by Safeguarding Ireland on the
Draft General Scheme and Heads of Bill for the Assisted Decision-Making (Capacity) (Amendment) Bill 2021
and
Assisted Decision-Making (Capacity) Act 2015.

19th January, 2022.

Summary of Recommendations:

(i) Recommendation:
Section 8 (1) of the 2015 Act be amended to read - *The principles set out in subsection (2) to (10) shall apply for the purposes of this Act.*

(ii) Recommendation:
Section 2 of the 2015 Act be amended by the further expansion of the definition of an 'intervener' to include the classes of persons (including legal practitioners and financial professionals) who are identified in Section 103(2) as intervening with a relevant person and who are obliged to comply with statutory codes of practice.

(iii) Recommendation:
The presumption of capacity should apply in the creation of an enduring power of attorney. Therefore, Section 60(1)(c) and (d) of the 2015 Act should be deleted.

(iv) Recommendation:
The 2015 Act be amended to provide that, where a statement of capacity is required, *a statement shall be provided by either a registered medical practitioner OR a healthcare professional* but not both.

(v) Recommendation:
Section 68(3) of the 2015 Act be deleted, reference to Section 68(3) contained in Section 78A(2)(b) and reference to Section 68(3) contained in Section 79A(1)(c) be deleted.

(vi) Recommendation:
It is necessary to ensure that the language used in the 2021 Bill reflects that capacity is determined in accordance with the functional approach to capacity (which is time specific) as specified in the 2015 Act. The correct term is 'lacks capacity'.

(vii) Recommendation:
The 2015 Act should make provision for legal aid under Part 5, in addition to an application to the court under Section 37 (initial application), legal aid should also be available in respect of an application under Section 48 (application for an interim order) and under Section 49 (application for a review of a declaration of capacity).

(viii) Recommendation:
The 2015 Act should make provision for legal aid in respect of applications to the court under Part 6 for wards of court.

(ix) Recommendation:
The 2015 Act should make provision for legal aid in respect of applications to the court under Part 7 for creating an enduring power of attorney.

(x) Recommendation:
The Director of the Decision Support Service should not be required to make application to court, particularly when carrying out her supervisory functions.

(xi) Recommendation:
Where a co-decision-maker or an attorney fails to comply with a notification from the Director in relation to an incomplete report, the Director may take such further action as she deems appropriate, in accordance with the circumstance of the case, or decide to carry out an investigation of the matter.

(xii) Recommendation:
Section 69 of the 2015 Act be amended to provide that, where the Director is satisfied that all reasonable efforts have been made without success to satisfy the notice requirements, the Director shall have the discretion to waive the notice requirements.

(xiii) Recommendation:
Section 71(3)(c)(ii) of the 2015 Act be amended to provide that, where the Director is of the view that an objection to registration of an EPA is well founded, she shall make a determination in the matter and a determination as to whether the enduring power be registered. In deciding to register the enduring power, the Director shall satisfy herself as to the criteria set out in Section 77(1)(b).

(xiv) Recommendation:
That the words 'with the approval of the Court' be deleted from the Section 99(8)(a), (Head 66 of 2021 Bill).

(xv) Recommendation:
That the words 'with the approval of the Court' be deleted from Section 100(5), (Head 67 of 2021 Bill).
Section 100(4) of the 2015 Act also needs to be deleted as being inconsistent with the role of a court friend.

(xvi) Recommendation:
The Register for Advance Healthcare Directives must be established and in place on the commencement of the 2015 Act.

(xvii) Recommendation:
The 2015 Act should give statutory recognition to the role of independent advocates.

(xviii) Recommendation:
To comply with constitutional requirements and international human rights obligations, legislation is urgently required in relation to Protection of Liberty Safeguards.

(xix) Recommendation:
Section 140 of the 2015 Act be amended to read as follows: *A person's capacity to make a will shall be construed in accordance with Section 3 of this Act.*

(xx) Recommendation:
The side heading for Section 21 of the Nursing Homes Support Scheme Act 2009 to read – 'Care representative in case of person who lacks capacity'.

(xxi) Recommendation:
Section 36(10)(b) of the 2015 Act to remain as enacted. Rules of Court to be developed to provide for the reporting of decisions in relation to applications to the courts under the 2015 Act.

(xxii) Recommendation:
Section 24 of the *Credit Union Act 1997* be amended to provide:
(a) *The capacity of a member of a credit union shall be construed in accordance with the provisions of the Assisted Decision-Making (Capacity) Act 2015.*
(b) *It shall be presumed that a member of a credit union has the capacity to manage and administer his or her own property, including with, if necessary, the assistance and support of a decision-making assistant or a co-decision-maker appointed under the Assisted Decision-Making (Capacity) Act 2015, unless there is an enduring power of attorney which has come into effect or a decision-making representation order in place in relation to such property.*

1. Introduction:

Safeguarding Ireland is an independent organisation, registered with both the Companies Registration Office and the Charities Regulatory Authority. Its main objective is to promote safeguarding of adults who may be vulnerable, protect them from all forms of abuse by persons, organisations and institutions and develop a national plan for promoting their welfare. This is achieved by promoting inter-sectoral collaboration, developing public and professional awareness and education, and undertaking research to inform policy, practice and legislation in the Republic of Ireland. Further information is available the Safeguarding Ireland website - https://www.safeguardingireland.org/

The *Assisted Decision-Making (Capacity) Act 2015* (2015 Act) is an extremely important piece of human rights legislation which is to replace archaic 19th century legislation. Its main purpose is to provide for the reform of the law relating to persons who require, or may require, assistance in exercising their decision-making capacity and to respect the dignity and rights of those persons. It is, therefore, important that, on the commencement of the 2015 Act, it is clear in its purpose that full consideration has been given to ensure its smooth implementation and that procedural barriers are not provided in the legislation that are both unnecessary and expensive and do not comply with the Guiding Principles set out in the Act to comply with the UN Convention on the Rights of People with Disabilities (UNCRPD).

Safeguarding Ireland welcomes many of the amendments contained in the Draft General Scheme and Heads of Bill for the Assisted Decision-Making (Capacity) (Amendment) Bill 2021 (2021 Bill) but wish to raise the following points for consideration.

2. Guiding Principles:

2.1 *Application of the Guiding Principles*

The Guiding Principles contained in the 2015 Act sets out principles enshrined in both the Constitution and in the UN Convention on the Rights of Persons with Disabilities (UNCRPD), which Ireland ratified in March 2018. The 2015 Act limits the application of these principles and how they are to be given effect. Section 8(1) of the 2015 Act provides that **the Guiding principles shall apply for the purposes of an intervention** in respect of a relevant person, and **the intervener** shall give effect to those principles. It was not intended that the principles provided for in the UNCRPD – the giving effect to the will and preferences and beliefs and values, and allowing a relevant person to participate in all decisions relating to them - be limited to a class of persons identified as 'interveners' in the 2015 Act. The general application of the principles provided for in the UNCRPD is further supported by the fact that it is necessary for Ireland to amend a number of pieces of legislation to ensure compliance of all statutory provisions with the UNCRPD. The Guiding Principles set out in Section 8 of the 2015 Act should apply for all of the purposes of the Act.

(i) Recommendation:

Section 8 (1) of the 2015 Act be amended to read - *The principles set out in subsection (2) to (10) shall apply for the purposes of this Act.*

2.2 *Directions to interveners to apply equally to all interveners*

It is noted that Section 8, subsections (6) and (7), give specific directions to an intervener in making an intervention. It is, therefore, necessary to ensure that the directions apply to all interveners making any intervention under the 2015 Act.

The 2015 Act currently provides that the directions to an intervener (under Section 8(6) and (7)) apply to classes of persons (as defined in Section 2 and extended under Head 3 of the 2021 Bill) to include healthcare professions but they do not apply to legal practitioners and financial professionals who are required to support a person to maximise their decision-making capacity, to enter into transactions and to give effect to those transactions under legally binding arrangements provided for under the 2015 Act. These are all persons who will be intervening with a relevant person and, in doing so, are required to work within statutory codes of practice. In addition to 'dealing with relevant persons', they **will also be directly carrying out 'actions' under the Act** (as defined in Section 2 of the 2015 Act) and these actions will include giving effect to specific provisions of the Act.

(ii) Recommendation:

Section 2 of the 2015 Act be amended by the further expansion of the definition of an 'intervener' to include the classes of persons (including legal practitioners and financial professionals) who are identified in Section 103(2) as intervening with a relevant person and who are obliged to comply with statutory codes of practice.

2.3 *Presumption as to capacity for the creation of an Enduring Power of Attorney (EPA).*

A number of Heads in the 2021 Bill provide for a proposed change in the process for registering an EPA (amendments to Sections 59, 60, and 78). The proposed new process requires that an EPA is to be registered at the stage of the execution of the EPA while the donor has capacity and is in a position to discuss issues with the Decision Support Service (DSS). The new process provides that, when the attorney notifies the DSS that the donor lacks capacity, the EPA will then come into effect. This amendment is to be welcomed, as it means that any queries that the Director may wish to raise on registration with regard to the format of the EPA and the requirements for execution, can be raised directly with the donor while the donor has capacity and is in a position to address any issues arising.

The 2015 Act gives statutory effect to the common law presumption of capacity and it is the first of the Guiding Principles set out in Section 8 of the 2015 Act. Section 59 provides that a person who has attained the age of 18 years (donor) can appoint another person, who has reached that age, as attorney. Section 60 of the 2015 Act provides that the donor is obliged to give a statement that he or she understands the implications of creating the power, intends the power to be effective at a subsequent time when he or she lacks capacity… and that they may vary or revoke the power before it takes effect. In other words, the person is confirming his/her capacity and understanding in creating the EPA and this is being done in the presence of a solicitor. Section 60 also provides that the legal practitioner (solicitor), who has been instructed by the donor to create an EPA, must state, having made enquiries, that he or she is satisfied that the donor understands the implications of creating the power, is satisfied that the donor is aware that he or she may vary or revoke the power… and has no reason to believe that the instrument is being executed by the donor as a result of fraud, coercion or undue pressure. Currently, the 2015 Act provides that a statement as to capacity from a registered medical practitioner and a healthcare professional is also required at the time of the creation of an EPA. In addition, the legislation provides that statements by medical professionals as to the capacity of the donor will be required when notice has been given to the Director that the person lacks capacity and the EPA should come into effect.

Safeguarding Ireland agrees with the requirement to assess capacity at this (second) stage of the EPA process but is of the view that the principle of the presumption of capacity, as provided in the Guiding Principles, should apply at the time of the execution (creation) of the EPA and that there should be no requirements for statements as to capacity at this (first) stage unless it is clearly indicated that capacity may be in question.

A person who wishes to plan for a time in the future when they may lack capacity should be facilitated in doing so rather than being confronted with procedures that may act as barriers preventing such arrangements being put in place.

(iii) Recommendation:

The presumption of capacity should apply in the creation of an Enduring Power of Attorney. Therefore, Section 60(1)(c) and (d) of the 2015 Act should be deleted.

3. Statements as to capacity:

3.1 *Requirement for two statements as to capacity – by a registered medical practitioner and by a healthcare professional*

When the 2015 Act was being prepared, it was requested that a wider group of healthcare professionals be included to assess decision-making capacity of persons who would come within the provisions of the legislation, in addition to medical practitioners. The view was that the capacity of persons to make decisions, particularly those with intellectual disability, could be more accurately assessed by a wider class of healthcare professionals who were interacting with service users on a very regular basis rather than by a medical practitioner who did not know the person. This was also an effort to move away from the medical model, which assessed a person's capacity based on the presence of a disability, towards a social/human rights-based model, which is to support the person to maximise his/her capacity to make decisions for themselves as required by the UNCRPD. The intention was that the legislation should provide that a statement as to capacity should be made by either a registered medical practitioner **OR** by a healthcare professional. This would accommodate the group mentioned but also accommodate the person who clearly has capacity, wishes to plan in advance by making an Enduring Power of Attorney (EPA) and would look to his/her GP to make the relevant statement.

The 2015 Act sets out how decision-making capacity is to be assessed and the statutory criteria to be used to determine that a person lacks the capacity to make a decision. Therefore, the requirement in the legislation for two such statements is excessive, unnecessary and costly both to the 'relevant person' and also to the State.

Situation where two statements of capacity are required.
Part 4 Co-Decision-Making Agreements:
Section 21(4) (f) – on the application for registration of a co-decision-making agreement.
Section 26(3)(a) and (b) – on review of a co-decision-making agreement.
Section 28(4)(c) – on the variation of a co-decision-making agreement.
Section 29(4) as amended by Head 19 of 2021 Bill – on the revocation of a co-decision-making agreement.

Part 7 Enduring Powers of Attorney:
Section 60(1)(c) and 61(1)(d) – on the creation of an EPA.
Section 68(7)(b) – application for registration of an EPA.
Section 73(4)(c) and (d) – revocation and variation of an EPA.
Section 78A (2021 Bill) – on notification to the Director that the donor lacks capacity.

(iv) Recommendation:
The 2015 Act be amended to provide that, where a statement of capacity is required, *a statement shall be provided by either a registered medical practitioner OR a healthcare professional* but not both. Amendment to the specified sections of the Act is, therefore, required.

4. Matters in relation to Enduring Powers of Attorney:

4.1 *Two stage requirement to serve notice under an Enduring Power of Attorney*

As stated at 3.2 above, the 2021 Bill provides for a proposed change in the process for registering an EPA. The proposed new process requires that an EPA is to be registered at the time of the execution of the EPA (first stage) while the donor has capacity and the EPA will come into effect (second stage) when the attorney notifies the DSS that the donor lacks capacity.

The 2015 Act provides that, both at the time of the creation of the EPA and at the time of notification to the DSS, notice must be served on to a number of people as specified in Section 68 and the new Section 78A (Head 56 of the 2021 Bill).

Safeguarding Ireland is of the view that the requirement to serve notice at the first stage, i.e., at the time the EPA is being created, is unnecessary for a number of reasons. It does not respect the right to privacy of the person, in addition to being a very direct barrier to the creation of the EPA where there are challenging family situations.

Safeguarding Ireland agrees that there should be a notice requirement at the time of the coming into effect of the EPA (second stage) when the DSS has been notified that the donor lacks capacity but not at the time of its creation when the donor has capacity. It is, therefore, suggested that Section 68(3) of the 2015 Act be amended to delete the requirement for notice at the time of the creation of an EPA. Consequential amendments are also necessary to the proposed new Section 78A (Head 56) and new Section 79A (Head 58), to delete reference to Section 68(3).

(v) Recommendation:
Section 68(3) of the 2015 Act be deleted, reference to Section 68(3) contained in Section 78A(2)(b) and reference to Section 68(3) contained in Section 79A(1)(c) be deleted.

4.2 *Terminology to reflect functional approach to decision-making capacity*

It is important that the language used throughout the 2015 Act is consistent and fully reflects the purpose, principles and definitions contained in the 2015 Act.

The introduction of terms into the 2021 Bill such as *'the donor has lost capacity'* or *'the donor has not lost capacity'* used in Head 50 and Head 56 Bill do not take account of the functional construction of capacity, as provided for in Section 3 of the 2015 Act. These terms require to be amended to accurately reflect the functional approach to *'the donor lacks capacity'* or *'the donor does not lack capacity'.*

(vi) Recommendation:
It is necessary to ensure that the language used in the 2021 Bill reflects that capacity is determined in accordance with the functional approach to capacity (which is time and issue specific) as specified in the 2015 Act. The correct term is 'lacks capacity'.

5. Legal Aid:

5.1 *Legal Aid under Part 5 of the 2015 Act for applications to court*

Part 5 - Section 52 provides for the amendment of the *Civil Legal Aid Act 1995* to provide for legal aid in relation to 'proceedings' the subject of an application under Section 37(1) of the 2015 Act but it does not provide for legal aid in relation to other applications to court under Part 5, such as an application for an interim order (Section 48) or in respect of review of declarations by the court (Section 49). This gap needs to be addressed.

(vii) Recommendation:
The 2015 Act should make provision for legal aid under Part 5, in addition to an application to the court under Section 37 (initial application), legal aid should also be available in respect of an application under Section 48 (application for an interim order) and under Section 49 (application for a review of a declaration of capacity).

5.2 *Legal Aid under Part 6 of the 2015 Act for wards of court*

Following submissions made after the enactment of the 2015 Act in relation to legal aid in respect of the review of the capacity of wards as provided for in Section 54, it was confirmed in the Oireachtas that provision for legal aid would be made to Wards to be consistent with the provisions made for court procedures in respect of the relevant persons under Part 5. While the amendment to Section 54 (Head 32) deals with the process of making the application to court, it makes no provision for legal aid to Wards of Court when their capacity is being reviewed. This needs to be addressed.

(viii) Recommendation:
The 2015 Act should make provision for legal aid in respect of applications to the court under Part 6 for wards of court.

5.3 *Legal aid under Part 7 for the creation of an enduring power of attorney*

Research carried out over the past number of years has indicated that there is a high level of financial abuse in Ireland. The prevalence rates for persons over the age of 65 years is at a level of 22-25% but, for those over the age of 80 years, the level of abuse is at yet a higher level. Financial abuse is mainly facilitated where there is an absence of formal arrangements in place (such as an EPA) and the lack of oversight to ensure, for example, that a 'pensioner' or a person with a disability, is in fact 'in receipt' of monies due to them.

The findings of a Red C Poll, commissioned by Safeguarding Ireland, indicated that only about 6% of the Irish population has made an EPA, which is a very low rate in comparison with other jurisdictions[1].

The lack of having an EPA in place means that there is no person with authority to make financial decisions, no person with authority to make personal welfare decisions, place of care decisions or general well-being decisions. Informal arrangements lead to abusive situations. Ultimately, if there is no EPA in place, an application to court is necessary (at a cost) to appoint a person with authority to make decisions. It is suggested that legal aid be provided for those who wish to create an EPA.

(It is intended that where a person can afford to do so they will be asked to contribute for the provision of legal aid).

(ix) Recommendation:
The 2015 Act should make provision for legal aid in respect of applications to the court under Part 7 for creating an enduring power of attorney.

6. Applications to court:

6.1 *Role of the Director of the Decision Support Service*

Part 9 of the 2015 Act provides for the establishment of an Office of Director of the Decision Support Service (Director) and assigns to the Director detailed statutory functions, which include both supervisory functions and investigatory functions. To enable her to carry out such functions, the Director is obliged to establish panels of suitable persons, to include special visitors, general visitors and court friends. The role and functions of each of these 'experts' are set out in Part 9 of the 2015 Act. The aim of the legislation was that many issues arising in relation to the arrangements provided for in the 2015 Act and the performance of the functions of the various decision supporters (who are obliged to make periodic reports to the Director) could and should be subject to the oversight of the Director without the need for interventions by the court. Yet, in spite of these clear statutory functions of the Director, there are a number of provisions (and further provisions suggested in the 2021 Bill) stating that the Director must obtain the consent/approval of the court or that the court must make a determination in a number of circumstances. Requiring the Director to make application to court should be a last resort and should not be required, particularly when carrying out her supervisory functions.

(x) Recommendation:
The Director of the Decision Support Service should not be required to make application to the court, particularly when carrying out her supervisory functions.

[1] https://www.safeguardingireland.org/wp-content/uploads/2020/05/Plan-Ahead-Future-Care-June-2020.pdf

6.2 ***Incomplete reports***

Section 27(4)(b) provides that the Director shall make an application to the court where a co-decision-maker fails to comply with a notification in relation to an incomplete report in order to have the court determine as to whether the co-decision-maker should continue as a co-decision-maker.

There is a similar provision in relation to EPAs.

Section 75(7)(b) provides that the Director shall make an application to the court where an attorney fails to comply with a notification in relation to an incomplete report to have the court determine as to whether the attorney should continue as an attorney.

In dealing with incomplete reports, and this relates to the supervisory function of the Director, the legislation should provide that the Director take such further action as she deems appropriate in accordance with the circumstance of the case or decide to carry out an investigation and make a determination.

(xi) Recommendation:

Where a co-decision-maker or an attorney fails to comply with a notification from the Director in relation to an incomplete report, the Director may take such further action as she deems appropriate in accordance with the circumstance of the case or decide to carry out an investigation of the matter.

6.3 ***Failure to satisfy notice requirements on registration of an EPA***

Section 69 (1) as amended by Head 46(a) of the 2021 Bill will provide a new Section 69(1B) to provide that the Director is obliged to make an application to court to waive the notice requirements in order to register the EPA, even where the Director is satisfied that all reasonable efforts have been made, without success, to satisfy the notice requirements.

The Director will have made full enquiries and will have satisfied herself that all reasonable enquires have been made. In some instances, it will be that contact has been lost with the family member or it may also be the case that the donor, for legitimate safeguarding reasons, may not wish to notify certain family members. The Director should have the discretion to waive the notice requirements. It should not be necessary for the Director to make an application to the court in these circumstances.

(xii) Recommendation:

Section 69 of the 2015 Act be amended to provide that, where the Director is satisfied that all reasonable efforts have been made without success to satisfy the notice requirements, the Director shall have the discretion to waive the notice requirements.

6.4 ***Objections to registration of an EPA and application to court to determine if an EPA should be registered.***

Section 71 of the 2015 Act provides that, where the Director is of the view that an objection to registration is well founded, the Director must then make an application to court for a determination. Section 77 also provides that, where the creation of the EPA is not in accordance with the provisions of the 2015 Act, the Director must make an application to court to determine if the EPA should be registered.

The role of the Director to determine these matters, rather than a court, is compelling in the light of the proposed amendments that the EPA is now registerable when it is created and when the donor has capacity. The Director will be in a position to raise queries directly with the donor and the donor has the ability to query/appeal a decision of the Director. The criteria to register the EPA provided for in Section 77 (1)(b) (if the court is satisfied) should be the criteria that the Director is obliged to follow in deciding to register the EPA.

(xiii) Recommendation:

Section 71(3)(c)(ii) of the 2015 Act be amended to provide that, where the Director is of the view that an objection to registration of an EPA is well-founded, she shall make a determination in the matter and a determination as to whether the enduring power be registered. In deciding to register the enduring power, the Director shall satisfy herself as to the criteria set out in Section 77(1)(b).

6.5 ***Direction to Special and General Visitor by the Director to examine and take copies of records:***

Section 99(6)(a) of the 2015 Act provides that the Director may direct a special or general visitor to examine and take copies of health, personal welfare and financial records held in relation to the relevant person by any person, body and organisation and Section 99 (8) provides that the special or general visitor shall seek the consent of the relevant person to examining and taking copies of such records unless the Director dispenses with the requirement to obtain consent. The subsection sets out the circumstance in which the Director can exercise such discretion to dispense with consent where '*the relevant person has refused to provide consent, but the taking of an action is necessary…for the special and general visitor to fulfil his or her functions'* or '*it is not practicable for the consent of the relevant person to be obtained.'*

It is now proposed to amend Section 99(8) and Head 66(d) to provide that the discretion of the Director in dispensing with the requirement for the special and general visitor to obtain consent from the relevant person, requires the approval of the court. Such provision will have the effect that the Director will be frustrated in her ability to carry out her statutory supervisory functions and to avail of the expertise of special and general visitors who have a clear statutory role as provided for in the legislation. It will also give rise to further cumbersome and unnecessary demands on limited court resources. The reason that the legislation provides that the consent of the person should be obtained (albeit many will not have the capacity to give consent)

is to ensure that the Guiding Principles are applied in order to encourage the person to participate, in so far as practicable, in any intervention in relation to them. Where it is not practicable to get that consent, then the Director should be enabled to proceed in her supervisory function with the assistance of a special or general visitor.

(xiv) Recommendation:
That the words 'with the approval of the Court' be deleted from the Section 99(8)(a), (Head 66 of 2021 Bill).

6.6 ***Court Friend's ability to examine and take copies of records***

Section 100 provides that the Director will appoint a court friend to assist a person to make an application to the court under Part 5 of the Act. Note that, where there is no person available to assist a person in court as provided for in Section 36(8) and (9), it will be the court who may direct the Director to appoint a court friend for the relevant person (Section 36 (9)(c)).

Section 100(3)(a) provides that, for the purpose of assisting a relevant person in relation to an application under Part 5, the court friend may examine and take copies of health, personal welfare and financial records held in respect of the relevant person. Section 100(5) provides that the court friend shall seek the consent of the relevant person to examining and taking copies of such records unless the Director dispenses with the requirement to obtain consent. Similar to above for special and general visitors, the subsection sets out the circumstance in which the Director can exercise such discretion.

Section 100(5), as now proposed to be amended by Head 67, will provide that the discretion of the Director in dispensing with the requirement for the court friend to obtain consent from the relevant person, requires the approval of the court. Many of the court friends will be appointed at the direction of the court and the court will be aware of the statutory functions of a court friend to assist a relevant person in relation to an application to the court, so it appears to be circuitous to have to receive the further approval of the court.

Note: Section 100(4) also needs to be deleted. It will not be possible for a court friend to assist the relevant person in court or promote the interests and will and preference of the relevant person in court (Section 100(9) if the court friend is debarred from examining health records.

(xv) Recommendation:
That the words 'with the approval of the Court' be deleted from Section 100(5), (Head 67 of 2021 Bill).
Section 100(4) of the 2015 Act also needs to be deleted as being inconsistent with the role of a court friend.

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7. Register for Advance Healthcare Directives:

Part 8 of the 2015 Act provides a statutory framework for Advance Healthcare Directives (AHDs) and Section 84(12) states that the Minister (for Health) may make regulations as respects AHDs, including regulations relating to – requiring the directive-maker to give notice of the making of an AHD to the Director and requiring the Director to establish and maintain a register of AHDs notified to her.

The DSS has recently published draft codes of practice on Advance Healthcare Directives for healthcare professionals and for Designated Healthcare Representatives (a decision supporter appointed under an AHD). The codes do not make any mention of a Register for AHDs nor provide for procedures for the giving of notice to the Director of the making of an AHD.

Section 83 of the 2015 Act provides that the purpose of AHDs is to enable persons to be treated in accordance with their will and preferences and to provide healthcare professionals with information about persons in relation to their treatment choices. Safeguarding Ireland is concerned that a Register on AHDs be established in time for the commencement of the 2015 Act so that the stated purpose as set out in the Act can be operationalised. It is also necessary to ensure that there be no delay in the commencement of Part 8 of the 2015 Act to ensure that healthcare professionals can be informed of the will and preference of a relevant person in relation to health treatment decisions.

(xvi) Recommendation:

The Register for Advance Healthcare Directives must be established and in place on the commencement of the 2015 Act

8. Independent Advocate:

Section 103 (2)(x) of the 2015 Act gives recognition to the role of advocates. It provides that the Director may prepare and publish a code of practice for… *the guidance of persons acting as advocates on behalf of relevant persons.* (A draft code was published by the DSS on 10th January 2022). All of the codes of practice prepared for the purposes of the 2015 Act refer to independent advocates.

Recognition of the important role of independent advocates is already contained in Regulations published by HIQA (in relation to both older persons' services and persons with disabilities) and the HSE Consent Policy (a review of which is about to be published and which further strengthens the need for a person to have access to an independent advocate). The documentation of many other State organisations and NGOs also refer to the need to ensure that a vulnerable person has access to an independent advocate. The COVID-19 Nursing Homes Expert Panel recommended that *HIQA and each nursing home provider should continue to highlight and promote independent advocacy services available to residents*.[2]

[2] https://www.gov.ie/en/publication/3af5a-covid-19-nursing-homes-expert-panel-final-report/

However, there is no specific provision in the 2015 Act giving a statutory status to the role and function of independent advocates. This should be rectified. It is important that there is legal clarity around the role of independent advocates and, in making such provision, the legislation should also provide for Regulations to set out the functions and standards required by independent advocates.

(xvii) Recommendation:
The 2015 Act should give statutory recognition to the role of independent advocates.

9. Deprivation of Liberty:

The need for a legal framework around the issue of detaining a person in a care facility, or any residence, against the person's will is an urgent matter. As highlighted in both the Court of Appeal (2018) decision and the Supreme Court (2019) decision in the *AC v Cork University Hospital and HSE* case, without the necessary legal procedures it is necessary to make an application to the court.

The Department of Health published a Consultation Paper *Deprivation of Liberty: Safeguard Proposals* together with the draft Head of a Bill in December 2017 which was to become Part 13 of the 2015 Act. Following over 50 detailed submissions, the Department published *The Deprivation of Liberty Safeguard Proposals: Report on the Public Consultation* in July 2019 but, to date, there has been no published legislative proposals in respect of 'deprivation of liberty'. It still remains an urgent matter as very many hours are spent by healthcare staff and advocates dealing with 'place of care' issues in acute hospitals, homes and nursing homes, not to mention the additional court time that is now necessary to deal with this matter due to the lack of 'procedures required by law'.

(xviii) Recommendation:
To comply with constitutional requirements and international human rights obligations, legislation is urgently required in relation to Protection of Liberty Safeguards.

10. Testamentary Capacity:

Section 140 of the 2015 Act provides that '*Nothing in this Act shall be construed as altering or amending the law relating to the capacity of a person to make a will'.* This was an unfortunate rushed amendment made to the Assisted Decision-Making (Capacity) Bill in December 2015 which replaced a proposed provision for a statutory will.

Having two separate capacity tests, one a statutory test for making an EPA and a separate common law test (*Banks v Goodfellow* going back to 1870) for making a Will, will lead to utter confusion and add to the number of applications to court. It will also be necessary to amend Section 77 of the *Succession Act 1966* to delete the words *'of ound disposing mind'* to comply with the UNCRPD and to adopt the functional construction of capacity as provided for in the 2015 Act.

It is suggested that Section 140 of the 2015 Act be amended to read as follows:
A person's capacity to make a will shall be construed in accordance with Section 3 of this Act.

(xix) Recommendation:
Section 140 of the 2015 Act be amended to read as follows: *A person's capacity to make a will shall be construed in accordance with Section 3 of this Act.*

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11. Amendment of Part 4 of the Nursing Homes Support Scheme Act 2009:
Head 87 of the 2021 Bill provides for the amendment to Section 21 of the *Nursing Homes Support Scheme Act 2009* to take account of the provisions of the 2015 Act. However, it is also necessary to substitute '*Care representative in case of person who lacks capacity'* in side heading for '*Care representative in case of person not having full capacity'.*

(xx) Recommendation:
The side heading for Section 21 of the Nursing Homes Support Scheme Act 2009 to read – 'Care representative in case of person who lacks capacity'.

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12. Hearings of applications by the court under Part 5 of the 2015 Act:
Section 36(10)(b) of the 2015 Act provides that '*Hearing of applications under this Part shall - be heard and determined otherwise than in public*' and Section 92(7)(b) which deals with application to the court in relation to advance healthcare directives (Part 8) also provides that '*Hearing of applications under this Part shall - be heard and determined otherwise than in public*'. Head 23 of the 2021 Bill now proposes to delete Section 36(10)(b) which means that any applications under Part 5 will now be heard in public. There is no proposed amendment to Section 92(7)(b). The rationale for deleting the provision contained in Section 36(10)(b) is given in the Explanatory Note which states that wardship hearings *are currently not held in camera although the court may impose restrictions on publication in sensitive cases.*

Safeguarding Ireland is concerned about this deletion and is of the view that hearings should be heard and determined otherwise than in public but is also of the view that there be publication of determinations by the court similar to reporting requirements in family law proceedings.

It is important that the right to privacy of persons is respected and protected to include privacy about their decision-making ability, privacy around health and personal welfare issues and privacy around their property and finances. If personal information, in relation to very vulnerable people, is made publicly available, given the high levels of, for example, financial abuse, it is likely to give rise to further safeguarding concerns.

In protecting privacy, Safeguarding Ireland is also of the view that it is necessary that judgements/determinations of the court be published to bring accountability and public confidence in the system and to understand the judicial reasoning for decisions taken by the court. This will inform and enhance practice, policy and legislation. It is also necessary to have access to data as to the type of issues arising or type of orders being made to ensure that the court systems are being developed to take account of the profile of the users of the courts. (Currently, under wardship proceedings, the publication of judgements is rare and, while court orders are made, it is necessary to have judicial reasoning for decisions taken in the courts).

It is suggested that Section 36(10)(b) of the 2015 Act should not be deleted and that Rules of Court be drafted to provide for reporting of the decisions of the court in line with the current reporting procedures in respect of family law matters.

(xxi) Recommendation:
Section 36(10)(b) of the 2015 Act to remain as enacted. Rules of Court to be developed to provide for the reporting of decisions in relation to applications to the courts under the 2015 Act.

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13. Amendment to Credit Union Act 1997:
Safeguarding Ireland welcomes the proposed amendments to the other pieces of legislation provided for in the 2021 Bill to include amendment to the *Social Welfare Consolidation Act 2005* (Head 86) and *Nursing Homes Support Scheme Act 2009* (Head 87) to take account of the provisions contained in the 2015 Act that relate to a 'relevant person', i.e., a person whose capacity is in question or a person who lacks decision-making capacity.

Amendment to the *Credit Union Act 1997,* which predates both the UNCRPD and the 2015 Act, is also necessary to take account of the reform of decision-making capacity legislation and to give effect to Article 4(1) of the UNCRPD.[3] In particular, Section 24 of the *Credit Union Act 1997* requires to be amended to read - *the capacity of a member of a credit union shall be construed in accordance with the provisions of the Assisted Decision-Making (Capacity) Act 2015* and to provide that members of credit unions be assisted in the management of their property in accordance with the support arrangements contained in the 2015 Act.

The terminology used in the legislation must also comply with principles set out in the UNCRPD particularly under Article 4(1).

[3] https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities/article-4-general-obligations.html

(xxii) Recommendation:

Section 24 of the *Credit Union Act 1997* be amended to provide:

(a) ***The capacity of a member of a credit union shall be construed in accordance with the provisions of the Assisted Decision-Making (Capacity) Act 2015.***

(b) ***It shall be presumed that a member of a credit union has the capacity to manage and administer his or her own property, including with, if necessary, the assistance and support of a decision-making assistant or a co-decision-maker appointed under the Assisted Decision-Making (Capacity) Act 2015, unless there is an enduring power of attorney which has come into effect or a decision-making representation order in place in relation to such property.***