Civil Inquiries into Mental Incapacity

The Report of the Sub-Committee of the Law Reform Committee of the Singapore Academy of Law for the Review of Proceedings under the Mental Disorders & Treatment Act (Cap. 178)

The Sub-Committee

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I. TERMS OF REFERENCE

Terms of Reference

1. Our Sub-Committee was constituted and invited by the Law Reform Committee of the Academy of Law, Singapore, to review the current law relating to civil inquiries into the status and affairs of persons of mentally incapacitated persons (hereinafter "subjects") under the Mental Disorders and Treatment Act (Cap. 178) ("the MDTA"), and to advance recommendations for reform, if appropriate.

2. Given the wide range of potential issues covered by the terms of reference, we thought that it would be useful for us to concentrate on reviewing the inquiry procedure provided for in Part I of the MDTA, and to consider in particular:

    - The procedure (currently governed by Part I of the MDTA) to be applied by courts of civil jurisdiction in determining whether any person subject to the jurisdiction of the court is of unsound mind and incapable of managing himself and his affairs (a "subject"),
    - The kind of orders which a court of civil jurisdiction may or should be empowered to make in the course and on the completion of such inquiries, including:
        - Orders for the provision of the care and protection of a person determined to be a subject following such inquiries, and

- Orders for the proper administration and protection of their property and rights,

- The kind of orders which a court should be empowered to make for the protection of any person who may be vulnerable by reason of the unsoundness of mind of a subject, and
- The powers of the Court to require any person subject to the jurisdiction of the court who is a party directly or indirectly (including witnesses and complainants) to civil or criminal proceedings to submit himself for psychiatric assessment, and to make orders for the institution of an inquiry into the mental health of such party as the Court may consider necessary.

3. In this paper, we deliberately omit any consideration of issues relating to the definition of insanity, mental incapacity or incompetence for the purposes of the criminal law as these are issues outside of our terms of reference.

4. We only deal with Part I of the MDTA, which we recommend be repealed and re-enacted as a separate piece of legislation. None of the recommendations advanced in this Report are intended to affect the provisions of Part II and Part III of the MDTA.

5. We have had the opportunity to consider the Report of Working Group III of the National Council of Social Service's Committee on Socio-Legal Issues Affecting Intellectually Disabled People ("the NCSS Committee") entitled "Review of the

Mental Disorders and Treatment Act, Cap 178" ("the NCSS Report") issued in June 1999. Some of the recommendations of the NCSS coincide with some of those advanced by us in this Report. We are of the view, however, that the main thrust of the NCSS' recommendations do not affect or are not relevant to the proposed scheme of legislative reform set out in this Report. While the NCSS Committee has concentrated on the issue of statutory protection and provision for the care of destitute intellectually disabled persons, our terms of reference are much wider. Our comments on the NCSS Report are set out in the Appendix to this Report.

II. THE EXISTING LAW

Legislative History

6. The principal law governing inquiries into the mental capacity of subjects in civil proceedings is to be found in Part I of the MDTA. The MDTA has its origins in the Straits Settlements Mental Disorders Ordinance 1935[1]. The 1935 Ordinance provided for the first time a procedure for a judicial inquiry into the mental competence of persons. Part II of the MDTA has even earlier antecedents in the Straits Settlements Lunatic Asylum Ordinances of 1858 and 1920[2].

Common Law Basis of Jurisdiction

7. The language and concepts employed in the MDTA can be traced to the earliest beginnings of English law. As long ago as the 13th century, it was already

accepted law that that the Crown in England in *parens patriae* "had both the power and the duty to protect the persons and property of those unable to do so for themselves, a category which included both minors (formerly described as infants) and persons of unsound mind (formerly described as lunatics or idiots)"[3]. This "ancient prerogative jurisdiction" of the Crown was subsequently delegated to the courts. In Singapore, it survives to this day in statutory form in Sections 17(d) and (e) of our Supreme Court of Judicature Act, which confers on the Supreme Court the "jurisdiction to appoint and control guardians keepers of the persons and estates of idiots, mentally disordered persons and persons of unsound mind"[4]. This common law prerogative jurisdiction of the courts has since been revoked in England, but survives unaffected in our common law as it does in jurisdictions such as the United States, Canada, Australia and other Commonwealth countries[5].

The Judicial Inquisition as to Lunacy

8. The procedure in Part I of the MDTA is patterned largely on the judicial inquisitions as to lunacy provided for under the 19th century English Lunacy Acts. These Acts concerned themselves largely with determining whether or not a person was of sufficiently unsound mind that he should be committed to a lunatic asylum for the protection of the person and of the general public. These Acts also provided a mechanism for the courts to appoint persons for the protection of the subject's person and assets. Such proceedings under these Acts were termed "judicial inquisitions into lunacy", and were presided over by a Judge in Lunacy, who exercised all the prerogative powers of the Crown in such matters[6]. The

Judge in Lunacy had the duty of determining whether the subject was "of unsound mind and incapable of managing himself and his affairs". This is exactly the phrase used to this day in Section 3(1) of the MDTA. The MDTA also follows the old Lunacy Acts in providing for the appointment of a "committee" for the person or the property (or both) upon the court determining that the subject is of unsound mind[7].

9. The old English Lunacy Acts have long since been repealed. They were supplanted by a progression of English Acts early in this century, notably by the Mental Deficiency Acts 1913 and 1927, and the Mental Treatment Act 1930. Most significantly of all, the entire framework of the law dealing with the mentally ill was revised in the Mental Health Act 1959, and again by the Mental Health Act 1983. The latter remains today the controlling statute in England. Throughout this time since its inception, the basic scheme of our MDTA has remained unchanged. Essentially, it perpetuates a procedure which was abandoned long ago in its home country. For this reason alone we think that a comprehensive review of the inquiry procedure in the MDTA is urgently required. The common law in this area has also changed dramatically. These developments in the common law give urgency to the issue of reform

III. CURRENT LEGAL TRENDS

New Fundamental Principles

10. In the last two decades, two fundamental principles governing the role of the law and the courts in the affairs of persons whose capacity to make decisions for themselves is either impaired or made impossible by mental illness or a physical condition (such as a state of irreversible coma resulting from a traumatic accident) have been elucidated and put on a firm footing in the English common law following a series of landmark cases reaching up to the House of Lords[8]. These two principles significantly alter the common law approach to the judicial determination of mental incapacity.

Autonomy and Self-Determination

11. The first of these two fundamental principles is the principle of autonomy and the right to self-determination[9]. Autonomy is the paramount principle to be applied by the law as regards decisions and choices to be made by an adult of sound mind regarding what he will or will not accept for his own body. This fundamental principle of the English common law (echoed in American, Canadian and Australian jurisdictions) has since also been accepted in our own jurisdiction in the shape of our Advance Medical Directive Act (Cap 4A)[10].

Best Interests

12. Where a person is not of sound mind, the second of the two fundamental principles operates in place of the first. This second principle is that in the

absence of a competent mind, the law should act to protect and secure the best interests of the subject. The "best interests" test, however, is not a simple one. The House of Lords, for example, has in one case held that the best interests of a subject who was in a state of irreversible coma would not necessarily be served by prolonging medical treatment and support (including nutrition and hydration). An order was accordingly given that such treatment and support should be withdrawn from him.

General Status and Functional Capacity

13. The most difficult cases are those in which the mental competence of the subject wavers on the thin line between understanding and incompetence. There is a developing consensus in the major common law jurisdictions that the law should abandon its traditional "general status" approach in favour of a more specific inquiry into the capacity of the subject to understand the consequences of making a particular decision – the so-called "functional capacity" approach[11]. Most of the older legislation in common law countries governing mental incapacity assume a general status approach: the law was generally only concerned with making a determination of whether or not a person was mentally incompetent for the purposes of the law. If a person was adjudged to be mentally incompetent following such an inquiry, he was to be regarded as being incompetent for all purposes of the law. The inquiry was therefore a threshold inquiry which decided his entire legal competence to make decisions for himself.

Current Common Law Trends

14. The common law in the majority of the major common law jurisdictions has since moved away from this broad approach in determining questions of mental competence for legal purposes. In Canada and in England, the common law now takes the position that a person who suffers from a mental disability that prevents him from making rational decisions in some areas of his life may nonetheless possess sufficient functional capacity to make decisions in other areas. For instance, the English Court of Appeal has accepted that a subject suffering from chronic paranoid schizophrenia held in a prison facility for the insane could in spite of his general illness still possess the particular functional capacity to understand and make decisions about a proposed course of medical treatment, to the extent that he was entitled to refuse treatment even if such refusal would have a good chance of resulting in his death[12].

The New Common Law

15. The emergence of this common law emphasis on functional capacity centred upon the twin foundations of respect for the autonomy of the individual and his best interests is both reflected and paralleled in the implementation in many common law jurisdictions of new legislation which attempts to place these two principles at the centre of judicial inquiries into the mental competence of subjects, and which generally favours the functional capacity approach over that of general status[13].

IV. INADEQUACIES OF THE EXISTING LAW

The Current Inquiry Procedure

16. The existing inquiry procedure called for by Part I of the MDTA is modelled after the judicial inquisition as to lunacy of the 19th century. The principal concerns of Part I of the Act are to secure the safety of mentally incompetent persons, and to effect the preservation of their property. We are of the view that this approach is far too narrow, and does not adequately reflect modern concerns and realities. In particular, the main weakness of the current Act is that it equates mental incapacity with mental illness. The two are not the same. A large proportion of subjects who lack capacity are not mentally ill at all in the ordinary sense. They are likely to have been competent working adults for most of their adult lives, but have lapsed into incapacity through the inevitable physical deteriorations and afflictions of old age, such as strokes and other debilitating illnesses or conditions. Such persons may have enjoyed long and fruitful careers and, in consequence, are likely to have considerable accumulated assets, and live for a considerable time after their incapacitating event because of the advanced medical care and technology available in Singapore. Such persons may therefore require the care and protection afforded by a guardian or a trustee (or both) for a lengthy period.

Specific Inadequacies of the Current Provisions

17. Under the existing provisions of the MDTA, a court may only declare a person to be incompetent if he is "of unsound mind *and* incapable of managing himself and his affairs" [our emphasis] – a definition taken directly from the old Lunacy

Acts[14]. This approach has been long abandoned in England, and is unsatisfactory for the following reasons:

- It is unclear and inadequate – the Act gives no guidance as to what is to be meant by "of unsound mind" and "incapable of managing himself and his affairs". The first would seem to contemplate that the Act only covers determination of incapacity due to mental illness (a reasonable interpretation, given the title and genesis of the Act). The second requirement makes it impossible to apply the modern common law concept of distinguishing general incapacity from functional capacity for limited purposes. The Act also clearly requires that *both* conditions be satisfied before a court may make a general status-based determination of incapacity.
- It is inflexible and no longer reflects the current state of the common law – a court may only make a determination of general incapacity, or not at all.
- A large class of persons is not covered by the Act – if the court is indeed restricted to determinations of incapacity only in cases of mental illnesses, then the Act fails to address a large class of persons who may no longer be competent, but who are not mentally ill. An example of persons falling within such a class would be persons who are unconscious because of an injury, illness or other physiological reason apart from mental illness. The current provisions do not meet the needs of mildly mentally handicapped persons who have sufficient functional capacity to care for themselves in most day-to-day activities (including holding down a job), but who may nonetheless remain vulnerable in other areas and may therefore require protection in those areas.

Indeed, the requirement that both limbs be satisfied is so rigorous that many mildly-ill persons who need care and protection may fail to be caught at all within the definition in Section 3(1).

- It stigmatises subjects. Not all persons who lack some or all capacity are mentally ill or handicapped. Unfortunately, there is still a strong social stigma attached to mental illness in Singapore, and we think that persons who may require the protection of the Act for reasons other than mental illness should not be subject to a process which would result in a declaration of unsound mind.
- The current mode of inquiry is based on its inquisitional parent, and places insufficient or no emphasis on the best interests of the subject, nor is the court directed to take account of the subject's wishes as to arrangements for his care, even if he can express such wishes competently (subjects may be competent to declare who they would prefer to have as guardians, or who they would like to live with and where, but yet be incompetent to look after themselves).
- Currently, inquiries can only be initiated by "any person related by blood or marriage to the person alleged to be mentally disordered, or by any public officer nominated by the Minister"[15]. We think this is too restrictive, for the reasons set out in paragraph 18 below.
- There are inadequate safeguards against abuse - the duties and obligations of the guardians and trustees are insufficiently defined, and the guardians or trustees are not subject to the general scrutiny or supervision of the court in the discharge of their duties and obligations (see paragraph 19 below).

- There is no clear requirement for the periodic review of the subject's condition, and of his welfare and treatment (see paragraph 20 below).
- Justification for order – the Act does not currently make clear who has the onus of justifying the grant of the order sought. We believe that in view of the consequences of an order on the personal liberty of the subject, the court should require an applicant to justify to the satisfaction of the court the grant of an order (see paragraphs 21 and 22 below).
- Under the Act, a determination of incompetence remains in force until the death of the subject, or unless someone applies to the court for the order to be annulled under section 26.

Proposed Power of Court to Initiate Inquiry

18. In particular, a court should have power to initiate an inquiry of its own accord in respect of a person who is a direct party to any proceedings before the court or who is appearing as a witness or a complainant in those proceedings. Our proposals in relation this power of referral are set out in paragraph 66 below. In this connection, we note that the current provisions of the MDTA are inadequate to cover the kind of situations where the only family members are unwilling or reluctant to make an application out of fear of the person. This has occurred where a wife feels sufficiently threatened by her husband to apply for a Personal Protection Order (PPO) for herself and her children, but is reluctant for various reasons (not excepting the cost of further legal proceedings) to make an application for an inquiry under Section 4. Yet another situation may be the one

in which the court has suspicions as to the mental competence of a party to a proceeding.

Necessity for Safeguards

19. We also note that there is very little provision in the way of safeguards to ensure that persons appointed to have power over the care and person of the subject, or his property (or both), carry out their duties in an accountable and responsible manner. We believe that this is inconsistent with the modern common law premise of the best interests of the subject: we note that in many major common law jurisdictions, the law has been amended so that specific qualifications (and disqualifications) are set out for potential guardians and trustees. Commonly, general accounting and reporting obligations are also imposed by such legislation.

Necessity for Periodic Review

20. Importantly, the new laws in many major common law jurisdictions impose a limit on the term of an order in the first instance. This is commonly for a period of 1 to 3 years, at the end of which the order will automatically expire, unless the original applicant or any other interested person should apply for an extension. We think that this is an important feature for many reasons. First, there is the aforementioned distinction between the general status and functional approaches. It is not correct to assume that a person who is suffering from a mental illness lacks all forms of capacity for all purposes, nor is it possible to assume that such a condition will be permanent, or that his condition will inevitably deteriorate.

Indeed, given the current state of medical science, it may be possible for a person suffering from a mental illness to be treated so that the symptoms and effects of his illness be controlled or suppressed entirely, although without curing the underlying illness or condition. Second, it makes clear that applicants are under a clear duty to the court to discharge their duties in the best interests of their charges, and allows the court to scrutinise the conduct of the applicants during the term of the order. Under the existing procedure in Part I of the MDTA, there is very little provision for supervision once an order is made: the successful applicant has no obligation to report to the court, and the court has no further opportunity to supervise or review the management of the subject's care and affairs by the applicant.

Presumptions, and Justification for Order

21. We think that a particularly important point to be expressed in any new procedure would be that the general burden should be placed squarely and clearly on any applicant to show and to justify that the application is *necessary in the best interests* of the subject.

22. We note that some jurisdictions have laws that make clear that the statutory presumption is that every adult person has the capacity to understand the nature, and to foresee the consequences, of decisions in respect of matters relating to his personal care and welfare, and to communicate decisions in respect of those

matters. Under such a scheme of statutory presumption, the person who applies for an order must prove the contrary to the satisfaction of the court.

23. We also note that in some jurisdictions, the legislation governing such inquiries specifically make it clear that the court's primary objectives (apart from the protection of the person and care of the subject, and his assets) is to make the least restrictive intervention as is possible in the life of the subject, and to enable and encourage the subject to exercise and develop such capacity as he still possesses to the greatest extent possible. This approach is consonant with both the concepts of functional capacity approach and the best interests approach: a court ought have power to have regard to the wishes of a subject where giving effect to the wishes of the subject would not harm the subject, it being in the best interests of the subject and his caregivers to allow him the greatest independence that his condition and understanding will permit.

Recommendations for Reform

24. For all the reasons set out above, we are of the view that the current inquiry procedure called for under Part I of the MDTA should be completely revised.

Our key recommendations are that any revision of the current inquiry procedure should:

- Abandon the current general status-based capacity approach, in favour of the modern functional capacity approach,
- Make clear that the onus is on the applicant to prove the subject's lack of capacity, as well the precise scope of such incapacity,
- Not equate or automatically link mental disorders or mental illnesses to mental incapacity,
- Make clear that the object of the inquiry should be the best interests of the subject in respect of his care, welfare, treatment and rehabilitation,
- Allow the court to take into account the wishes of the subject in relation to proposed arrangements for his care and welfare, if the subject can competently express them,
- Encourage the subject and his guardian or trustee to work towards rehabilitation if this is possible, and to be cared for and function as far as may be possible in a non-institutional setting (ideally as part of a family),
- Impose clear duties and obligations on the guardians and trustees appointed by the court,
- Require of applicants fuller disclosure of interests and conflicts of interests,
- Require applicants to justify to the satisfaction of the court that the order sought should be granted as being in the best interests of the subject,
- Give the court a supervisory jurisdiction over guardians and trustees in the performance and discharge of their duties and obligations,

- Provide for the least amount of intrusion and restriction on a subject's personal life and decision-making capability as is consistent with providing a framework of basic care and protection for the subject and his assets,
- Empower the court to initiate inquiries, or to require any party to any proceedings to submit to examination in cases where the court is of the view that the mental capacity of the party may be material, or may impinge on the personal safety of persons affected by the proceedings,
- Provide for a limited term to orders and for the periodic review of orders and the condition of the subject,
- Bring the duties and obligations of trustees more in line with the provisions of the Trustees Act,
- Provide for a streamlined procedure with Advance Powers of Attorney (which we discuss in paragraph 82 below), and
- Repeal Part I of the MDTA, and to re-enact it as a separate piece of legislation, leaving Parts II and III of the MDTA as they are. We recommend that the new legislation be entitled the Mental Incapacity Act.

Recommended Procedure

25. There should be two stages to the inquiry process to reflect two quite distinct and different functions:

- **The Determination of Incapacity.** In the first stage, the court has to decide whether to make a determination of incapacity after hearing the evidence, and if so, what kind of determination it should be. The determination may be one of general incapacity (which would be essentially the same as in the current procedure). Or it could be a determination of the loss of functional capacity in limited areas (which the current procedure does not provide for). We discuss this first stage in **Part V** below.
- **The Substantive Order.** If the court decides to make a determination of incapacity, it will then have to go on to decide on the evidence what kind of arrangements should be made for the care and protection of the subject. We discuss this second stage in **Part VI** below.

V. THE DETERMINATION OF INCAPACITY

Definition of Incapacity

26. Some difficulties attend the notion of exactly when and in what circumstances such a judicial inquiry into the mental competence of a person becomes "necessary". In the clearest situations, an inquiry becomes necessary when a legal act is required either of the subject, or on his behalf during his state of incapacity. For example, a previously competent person may as a result of an illness or injury go into an irreversible coma. Certain decisions may then have to be taken on his

behalf: who is to care for him, what choices of treatment should be sought and accepted, and whether his caregivers are entitled to reimbursement from the property of the subject. If he has rights upon which he must act within a certain time frame (renewal of a lease, exercising options), someone must be given the authority to exercise these rights or to protect them on his behalf. In marginal cases, it may well be possible for someone who lacks the capacity to even care for himself, and is mentally ill to such an extent that he may be dangerous to others, to retain nonetheless in law the functional capacity to decide on other aspects of his affairs[16]. In such cases, the main difficulty centres upon the question of whether the court should intervene by making an order for the appointment of a guardian or a trustee, as appropriate.

Capacity: Other Jurisdictions

27. In Australia, the approach is generally to determine the status of the subject, and the consequences will then flow from that determination. In Canada, the approach is more flexible in that the courts are entitled to determine what particular order would be in the best interests of the subject under the particular circumstances reported to the courts.

28. Overall, the modern trend is that the courts should be more strict about the order being sought. We note in particular the principle, expressed in the legislation of many jurisdictions, that an order which would overrule the wishes of a subject should only be given if there is no less restrictive way of saving the subject or his

property from harm. In Alberta, the courts have an option to appoint a "partial" guardian or a partial trustee for a specific purpose with specific powers, instead of a guardian or trustee with full powers (a "general" guardian or trustee): indeed, the courts are enjoined not to make a plenary guardianship or trusteeship order if a simple restricted partial guardianship or partial trusteeship will be sufficient to meet the needs of the subject . The general picture is that there is a move towards putting the minimum restrictions on the freedom of the subject as is strictly necessary for his protection, to encourage the integration of subjects into society, and as far as possible to encourage them to make such decisions as they can make for themselves.

Capacity: Recommendations

29. **WE RECOMMEND** that the finding that a court in Singapore should be directed to make at the end of an inquiry is whether the subject is under a disability (whether arising from mental, physical, congenital, psychological or intellectual condition) by reason of which he cannot:

    (a) make decisions on matters relating to his health, or his affairs, or both;

        or

    (b) communicate such decisions.

VI. THE SUBSTANCE OF ORDERS

New Concepts: Guardian and Trustee

30. Upon a determination of incapacity by the court, the court should have the power to appoint a guardian of the person of the subject, or a trustee of the property of the subject, or to appoint one person as both guardian and trustee. We recommend the abandonment of the older terms "committee of the person" and "committee of the estate" derived from the English Lunacy Acts. We substitute the terms "guardian" and "trustee" respectively, which we think better reflect the duty of the appointee. Likewise, we prefer to refer to the subject of the inquiry, who has been determined to require the appointment of a guardian or a trustee (or both) by reason of his mental incapacity as a "subject".

General Guardianship and Limited Guardianship

31. We recommend that, as in Alberta, the court should have the discretion to choose between granting a guardian powers in general terms, or only such specific powers as may be sufficient for the guardian to meet the needs of the subject. For example, if the issue is simply one of the resistance of the subject to accepting necessary medical treatment, then the court should grant only such specific powers as are necessary for the guardian to secure appropriate medical treatment for the subject, such as the power to seek and to consent to any health care or medical treatment that is in the best interests of the subject. This is on the principle that where the subject is not wholly incompetent, but is still capable of making some decisions for himself, the court should act to grant an order which would be the least restrictive and intrusive on his remaining ability to decide on his personal affairs. The court should be slow to grant and should presume against

the grant of general powers to a guardian unless the applicant can prove to the satisfaction of the court that the best interests of the subject require that the entire range of general powers should be conferred on the guardian. If, however, the court is satisfied that the subject lacks any kind of capacity, then the appropriate order would of course be for a grant of powers in general terms. We discuss in paragraph 37 what some of these general powers may be. For the purposes of the Report, we refer to a guardian who has been conferred such powers in general terms as being a "general guardian"; and to a guardian who has been conferred only limited powers as a "limited guardian".

General Guardians and Medical Decisions

32. We considered the issue of whether a general guardian should be empowered to give consent to the discontinuation of non-therapeutic life support in cases where the subject is terminally ill, unconscious and dying, and note the provisions of the Advance Medical Directive Act[17] and of Section 2A of the Interpretation Act. We reached no conclusion on this issue. In our opinion, where the subject had already executed an advance medical directive prior to his becoming incapacitated, a guardian should have no power to give notice of revocation under Section 7 of the Advance Medical Directive Act. Likewise, we also note that where the subject is brain-dead within the definition of Section 2A of the Interpretation Act, there is no necessity for any consent to be given by a guardian for the withdrawal of non-therapeutic life support.

33. We take the view that no guardian should have the power to consent to allowing the participation or involvement of the subject in any medical research or medical trial, with the exception that a guardian may give consent to the administration of experimental therapy if the life of the subject may be endangered otherwise (for instance, a guardian should be able to consent to the administration of experimental drugs in chemotherapy)[18].

34. We also considered the question of whether a guardian should be allowed to consent to pyschosurgery[19] and electroconvulsive shock therapy. While we are given to understand that all electroconvulsive shock therapy is currently administered to subjects under general anaesthesia, we take the view that such treatment, as well as any form of pyschosurgery, should be subject to specific leave being obtained from the court. If the Western Australian definition of pyschosurgery is followed, it would also mean that any kind of surgical operation on the brain would be subject to consent being obtained from the court. We agree with the Australian approach[20].

35. Despite extensive discussion, we reached no conclusion on the issue of whether the power to consent to an abortion should be included in the grant of general powers to a general guardian.

General Guardians and Family Decisions

36. Other issues considered were whether guardians ought be given the power to adopt in the subject's name, to give consent to be married on behalf of the subject,

and to file for divorce on behalf of the subject. We came to the conclusion that as regards adoption, no guardian should ever be allowed to adopt in the subject's name. Similarly, a guardian ought not have the power to give consent to be married on behalf of the subject. The question of divorce was somewhat more difficult. We thought that it was perhaps best that if this was to be allowed, it should always be subject to the consent and control of the court. However, a guardian ought have the power to defend divorce proceedings instituted against the subject and to act for the subject in ancillary matters.

General Guardians – General Scope of Powers

37. If the guardian is to be granted general powers, such general powers might be defined as including all the powers as a parent would have in respect of a minor child or infant. Such general powers might include, among other things, the power to determine where the subject is to live, with whom the subject is to consort, the kind of work or social activities he should engage in, the kind of education or vocational training the subject should receive, to make normal day to day decisions on behalf of the subject (including the diet and dress of the subject), and to seek and give consent to any health care that is in the best interests of the subject, with the exception that no sterilisation procedure or any medical treatment or procedure intended to render the subject irreversibly sterile should be administered without the leave of court. The court should only grant such leave if it is satisfied that the treatment or procedure is in the best interests of the subject[21].

Concurrent Guardians and Trustees

38. We see no objection to the guardian and trustee being one and the same person (particularly if the proposed guardian and trustee is the spouse of the subject, or if the subject's assets are not considerable). In general, we think that one person should be appointed to either or both posts, but the court should have the discretion to appoint up to four persons in each position. Guardians will have to be natural persons, but a trust company may be appointed as a trustee.

General and Limited Trustees

39. We recommend that the distinction between limited guardians and general guardians should in like manner be applied to trustees of the subject's property, and the powers of the limited trustee likewise defined by the court in the order. A limited trustee may be granted only the power and authority that may be necessary for him to protect, conserve, improve or add to the assets of the subject as the court may think appropriate, and such powers may extend to any one or more of the implied powers of a general trustee set out above, or any other power that the court may think appropriate.

Powers in Relation to Testamentary Dispositions

40. The powers of a trustee should not extend to the making or revocation of a will, or a CPF beneficiary nomination or the alteration or revocation of a CPF beneficiary nomination, on behalf of the subject.

General Powers in Relation to Assets

41. The general powers of a general trustee should include the power to make investment decisions as a trustee under the Trustees Act[22], redeem mortgages, grant leases not exceeding 3 years, issue or give or receive notices in relation to the estate or assets of the subject, accept or make transfers or assignments of leases, and generally to manage the subject's assets in accordance with the principles in the Trustees Act[23]. In respect of litigation or the enforcement of choses in action, a general trustee ought to have the power to continue any litigation already commenced at the time of the application (the existence of which had already been disclosed to the court in the applicant's first affidavit), and to defend, accept or propose compromises or settlements or discontinue actions as the trustee should deem fit. In all other cases, the general trustee ought be required to seek leave of court to commence any action.

General Trustees – Other Specific Powers

42. We recommend that the implied powers of general trustees as respects the property and affairs of the subject should extend to the following matters[24]:

- The control and management of his property,
- The resignation of the subject from a partnership of which he is a member,

- The carrying out of any contract entered into by him which is not a contract for personal services,
- The discharge of his debts and of any of his obligations, whether legally enforceable or not,
- The exercise of any power (including a power to consent) vested in him whether specifically as a trustee or otherwise.

Registration of Trustees

43. We recommend that a Register of Trustees be established and maintained in the Supreme Court Registry. Such a register should include the name of the subject, the name of the trustee, and the date of the order of court. The Register should be open for public inspection. We also recommend that statutory provision be made to allow the registration of Orders of Court for the appointment of trustees with the Land Titles Registry and the Registry of Deeds, so that notice may be given of the trustee's authority and powers to any third party seeking to deal with the property of the subject.[25] It may be necessary for the legislation to provide specifically that where a transaction is entered into between a person who does not have capacity and another who has actual notice of the order in the period immediately after the making of an order but before its registration, that transaction should be void. On the other hand, if the other person did not have actual notice of the order, but knew or should have known of the incapacity, the transaction should be voidable.[26]

Power to Give Maintenance

44. A trustee should (and shall, if the subject by any applicable law is obliged to do so) be empowered to exercise his authority for the maintenance, education, benefit and advancement of:

(a) the subject's spouse,

(b) a minor child of the subject under 21 years of age,

(c) a handicapped adult child of the subject, who by reason of physical or mental disability is unable to earn a living,

(d) a parent of the subject, or

(e) with the consent of the court, any other person,

or any or all of them[27].

The Public Trustee

45. We recommend that the powers of the Public Trustee under the Public Trustee Act[28] be clarified and amended to allow the Public Trustee to act as the applicant to set in motion the proceedings for an inquiry. Any court of competent jurisdiction (whether subordinate or otherwise) should also have the power where it thinks appropriate to direct the Public Trustee to make such an application. We note that, in this respect, the courts are already empowered to direct the Public Trustee to act as the guardian *ad litem* of minors in any suit or proceedings[29].

Duty of Public Trustee

46. We propose that the Public Trustee should have a statutory obligation to investigate the circumstances of any subject referred to him by any public officer, social worker or welfare organisation (or such other classes of persons as the Minister may name). If it appears to the Public Trustee upon investigation that the subject is in need of the care or protection of a guardian, the Public Trustee should be under a duty to make an application to Court for the appointment of a guardian. Where no suitable or willing guardian can be found for such a subject, the Public Trustee should have the power to refer the subject to the Director of Social Welfare for protection and care.

Deference to Wishes of Subject

47. We adopt the approach of the Law Commission in recommending that in granting orders for guardianship or trusteeship, the court should take account (as far as is practicable and reasonable) of the subject's wishes (whether expressed in the course of the inquiry or at any time previously), and if the subject is able to express an opinion, he should be asked for his views and preferences in relation to the matters sought to be achieved through the application[30].

General Duties of Guardians and Trustees

48. **Strict Duty of Disclosure.** A guardian or a trustee should be obliged by the terms of the order and by the governing statute itself to immediately apply to court for directions if any conflict of interests between the interests of the guardian or the trustee and the interests of the subject, potential or actual, should arise, giving full

disclosure of any such conflict of interests. The court should have power to give further directions or orders as may be appropriate, including the removal of the guardian or trustee and replacing him with another.

49. **Strict Duty to Secure Best Interests of Subject.** We think it is important to state that all guardians and trustees, whether general or limited, should at all times be under a duty to exercise their power and authority in good faith:

(a) in the best interests of the subject,

(b) in such a way as to encourage the subject to become capable of caring for himself and of making reasonable judgments in respect of matters relating to his person[31], and

(c) to endeavour to carry out and achieve as far as possible the objectives of the Act.

The guardian and trustee should be under an obligation to immediately seek further directions from the court if the circumstances or the condition of the subject have or has changed so materially since the grant of the appointment that the continued guardianship or trusteeship may no longer be in the best interests of the subject, or the subject cannot or can no longer be cared for in the manner assumed by the court on the grant of the original appointment.

Discharge of Guardians or Trustees

50. We recommend that the guardian or trustee or any interested person may apply to the court for an order discharging the guardian or trustee from his office on the ground that he has at any time been, is or has become, subject to the disqualifications of a guardian or trustee set out in paragraph 63 below.

51. The discharge of a guardian or trustee should of course not discharge the guardian or trustee from any debt, obligation or duty already vested or incurred, and the court may (and in the case of trustees, shall) require an account to be given by the guardian or trustee of his dealings with the subject or his property, or both. Upon receiving such an account, the court should be empowered to make such order as it deems appropriate, including orders for the reimbursement or remuneration or both of the guardian or trustee.

52. A guardianship or trusteeship shall be automatically discharged by the death of the subject, or of the guardian or trustee, as the case may be.

Indemnification and Remuneration

53. Subject to the provisions for review and the furnishing of accounts which we suggest in paragraphs 55 to 58 below, guardians as a general principle should be entitled to recover directly from the estate of the subject by way of indemnification and reimbursement such expenses as they incur in carrying out their duties under the Act and under the terms of the order of court. Such reimbursement should be allowed directly, without need for application to the

court. We believe that a guardian or a trustee should be entitled as of right to reimbursement and indemnification so long as the guardian or trustee has acted in good faith in the discharge of his duties, even as against acts which are actually not (or which the court may rule are not) in the best interests of the subject.

54. We think that on general principle, it should be open to the court to order remuneration (as distinct from simple reimbursement) for guardians and trustees, but with the proviso that such remuneration should be specified in the court order for guardianship or trusteeship, and that it be subject to the review and supervision of the court as set out below.

Review and Extension

55. We strongly recommend that, unlike in the existing procedure, the law should provide that an order for guardianship or trusteeship (or a combined one) should not be for an unlimited period, but should be for a fixed initial term. We recommend an initial term of no more than 3 years. This would enable the condition of the subject to be reviewed by the court from time to time. Such a provision ought not prevent a court from ordering any shorter term to the order as it may think fit. Furthermore, it should make clear that guardians and trustees are encouraged to apply to court for further directions in the event of any doubt as to what course of action they should take[32].

Procedure for Review and Extension

56. At the end of the initial term of three years, or such shorter term as the court may have granted in the initial order, an application may be made by a guardian or trustee for the renewal of the order for another term not exceeding three years, upon such terms as the court may see fit. The guardian or trustee must for the purposes of such an application:

    (a) file an affidavit stating the current health and condition of the subject, and exhibiting an up-to-date medical report,

    (b) give an account of what has been done for and to the subject since the time of the original grant of order,

    (c) indicate what further orders are wanted, and for what reason(s),

    (d) where the application is made for the renewal of a trusteeship, the trustee should provide the court with accounts of his administration of the assets (including a true inventory of the subject's assets and liabilities) and serve these accounts on the Public Trustee and such other persons as the court may direct.

Trustee Accounts

57. Even if no renewal is sought, a trustee shall be obliged in the first instance to file and serve such accounts within 60 days of his appointment, and thereafter at quarterly intervals, unless directed otherwise by the court. A trustee should be required to file full and complete accounts of his administration of the subject's estate with 60 days of the expiry or earlier determination of the order of trusteeship by a court or by any applicable law (for instance, in the event of the

death of the subject). In any event, the court shall have the power in its discretion to require any guardian or trustee to file such accounts at any time as it thinks fit. Such accounts should be open for inspection by family members, or with the leave of court, other interested persons.

Protection for Guardians and Trustees

58. We believe that while it is desirable that the law should spell out the duties and obligations of guardians and trustees in detail, it is probably unwise to criminalise any breaches by guardians or trustees of their obligations under the Act or under the order of court, so long such breaches have been attended by good faith and by simple failure to meet requirements within the specified time. Our law should not discourage responsible persons from coming forward to volunteer themselves as guardians and trustees of subjects. We believe that such breaches should be taken only as breaches of civil obligations, which would entitle any interested party to take out an application to court to compel the guardian or trustee to performance of that duty, failing which the court could punish for contempt of court. The exception to this rule against criminalisation of breaches would be acts involving dishonest or fraudulent acts, rash or negligent acts endangering the health, safety or well-being of the subject, concealment of material facts from the court, filing false particulars, or any other criminal act covered by the general criminal law.

VII. THE INQUIRY PROCEDURE

59. In this section, we review the existing inquiry procedure, identify some issues which we think need to be considered in any proposed revision of the MDTA inquiry procedure, and advance our suggestions as to how the inquiry procedure could be revised.

Forum

60. The existing MDTA procedure provides that the court of first instance for all applications should be the High Court. We agree that this principle should be retained, given the drastic consequences of an order on a subject's legal capacity and his personal freedom. This approach is also consonant with the Supreme Court's prerogative powers (including the writ of *habeas corpus*), and its common law prerogative powers *in parens patriae* (derived from the Crown) over incompetent persons.

Jurisdiction

61. Section 3 of the MDTA uses the term "any person subject to the jurisdiction of the court" – we recommend that this approach be retained, but perhaps clarified to make clear that the court's jurisdiction should extend to any person physically in Singapore, with the proviso that the court shall not be obliged to hear the application if it is not satisfied that the person is ordinarily resident in Singapore. Section 22 of the MDTA, which allows the court to transfer the property in

Singapore of a foreigner living abroad to the guardian of that foreigner (appointed under similar legislation), should also be retained.

Applicants

62. We think that the current class of permitted applicants could be enlarged. We suggest that the classes of persons who should be allowed to apply should include:

- The subject himself, if he is at least 21 years of age,
- Any member of the immediate family of the subject (spouse, brother, sister, parent or grandparent, child, or grandchild),
- A donee of a Power of Attorney executed by the subject prior to his incapacity, in which he has declared his desire that the donee should be appointed as his guardian, or as the trustee of his property (or both) in the event of his becoming incapacitated[33] (we treat donees under powers of attorney separately in this Report from page 50 onwards, below),
- The Public Trustee,
- Any person who has at any time in the past been appointed a guardian or a trustee or both of the subject, or is currently either pursuant to an existing order of court, or
- Any other person with the leave of court.

Disqualifications

63. We think that an applicant should be required to declare in the affidavit in support of his application whether or not he is subject to any of the disqualifications set

out below. We take the view that minor conflicts of interests should not disqualify applicants, particularly if they are close relations of the applicant, so long as such conflicts are fully disclosed to the court. A court *may* consider an applicant, proposed guardian or trustee to be disqualified if:

(a) the applicant, guardian or trustee has been convicted of an offence involving fraud or dishonesty,

(b) the applicant, guardian or trustee has been convicted of any sexual offence or of an offence involving violence or the threat of violence against any person,

(c) the applicant, guardian or trustee has contravened or failed or refused or neglected to comply with requirements of the Act, or the terms of the order, or to carry out any duty or obligation thereunder,

(d) the applicant, guardian or trustee has failed to make full disclosure to the court of any fact or material interest or conflict of interests which the court thinks material and ought have been disclosed to the court,

(e) the applicant, guardian or trustee has been adjudicated a bankrupt or has gone into liquidation or has become insolvent,

(f) the applicant, guardian or trustee has acted in an improper manner or in a manner that has endangered or that may endanger the well-being of the subject,

(g) a conflict of interests between the guardian or trustee and the subject has arisen such that the continuation of the appointment of the guardian or trustee may not be in the best interests of the subject,

(h) if the court is of the view that the applicant, guardian or trustee is no longer a suitable person to act as a guardian or trustee as the court in its sole discretion shall decide,

(i) if the court is of the view that the continued appointment of the guardian or trustee is no longer in the best interests of the subject, or

(j) the guardian or trustee has applied for his own discharge.

Burden of Justification

64. We take the view that it is just and appropriate that the onus should lie on the applicant to justify to the court that the order sought is both necessary and in the best interests of the subject. We would adopt the approach taken by the English Law Commission in their draft Mental Incapacity Bill, and require such applicants to prove to the satisfaction of the court that the application is appropriate, with the court having regard to the following matters[34]:

- The applicant's connection with the person in relation to whom the application is made
- The reasons for the application
- The benefit to the person concerned of the proposed order, directions or authority,
- Whether that benefit can be achieved in any other way.

65. In respect of applications by the Public Trustee, we suggest that any court in Singapore should, if it takes the view that the mental competence of any person

who is a party directly or indirectly to any proceedings is or may be a relevant concern, have the power at its own instance to direct the Public Trustee to make such an application for an inquiry.

Power of Referral

66. We also suggest that where a court is of the view that the mental capacity of any person who is party directly or indirectly (including witnesses and complainants) to any proceedings should be investigated, the court should have the power to direct that such a person should submit to or be referred for psychiatric assessment. Alternatively or in addition, powers should be given to courts to order an appropriate public officer (for example, any registered medical practitioner or social worker) or the Public Trustee or his delegate to investigate the mental competence of such a person, and to report his findings to the court. The appropriate provision would then have to be made to compel the attendance by the subject and his co-operation with such public officer for the purposes of such a preliminary investigation, which would normally be for the purposes of helping the court to decide whether or not to direct the Public Trustee to file an application for an inquiry.

Inquiry Procedure

67. We recommend that the Originating Summons procedure be used to initiate the proceedings, and the particular form to be used should be the one where no appearance is required.

Service

68. We recommend that the applicant should be required to serve the Originating Summons on the following persons:

(a) the subject;

(b) the subject's spouse, if any;

(c) such of the subject's children as are 21 and above, if any;

(d) if the subject is not married or if the applicant is the subject's spouse, then on the parents of the subject, or if there are no parents, then on such of the subject's siblings as are 21 and above;

(e) the proposed guardian or trustee, if he is not the applicant;

(f) the person or persons currently having custody or care of the subject.

69. We recommend that service on the subject be personal, but that service on any of the other persons may be effected either personally or by registered post. We also recommend that the applicant be required to file an affidavit of service before the first hearing of the application, and that he should be required to disclose any knowledge that he may have of the existence, identity and whereabouts of the persons listed above.

The Applicant's Affidavit

70. We recommend that the applicant's initial affidavit in support of his application should contain:

(a) a statement of the applicant's interest in the application,

(b) a description of the immediate reason for the application,

(c) a description of the subject including information on his relatives or any other person who might have an interest in him or the application,

(d) a statement of the applicant's relationship to the subject (and if not related by blood or by marriage, a statement of the social circumstances of that relationship),

(e) a full disclosure of any benefit that he may stand to gain (monetary or otherwise) and any conflict of interests that may result from an order in terms being granted on his application (including but not limited to his being a beneficiary potential or otherwise under applicable laws of the subject's estate),

(f) an explanation of why the order sought is in the best interests of the subject,

(g) a description of the present and previous care arrangements for the subject including a short account of how the subject has been cared for and by whom since sustaining the disability complained of,

(h) a description of the past and current medical history of the subject, and particulars of past and current arrangements for his medical care,

(i) a medical report by a registered medical practitioner including a recent photograph of the subject, stating as far as possible the practitioner's assessment of the limits of the subject's capacity to understand decisions affecting his person, welfare and property, his ability to understand them, and his ability to understand the consequences of such decisions,

(j) where the proposed guardian is not the applicant, the consent of such proposed guardian or trustee,

(k) if the application seeks to appoint a trustee over the subject's property, a description of the subject's assets, a description of the proposed trustee and a consent by the trustee from the trustee to his appointment,

(l) how the proposed guardianship or trusteeship arrangement or any other arrangement sought by the applicant in his application will be financed,

(m) generally, any other particulars as the best interests of the subject would require to be disclosed to the court, and

(n) a declaration that he (and the proposed guardian or trustee, if the applicant is not the proposed guardian or trustee) is or are not disqualified on any of the grounds set out in paragraph 63 of this Report.

Further Directions

71. After the Originating Summons has been filed, the applicant should file a application for directions. Some of the directions which might be asked for and granted would include:

(a) the dispensation of service of the application and affidavit on the subject or any other party,

(b) the dispensation of the subject's attendance at the hearing of the Originating Summons,

(c) that a report from a social worker, registered medical practitioner or specialist or other appropriate professional be obtained,

(d) that a lawyer be appointed to represent the subject,

(e) that any other person as the court thinks appropriate be served notice of the proceedings, or joined as a party to the proceedings,

(e) general directions about the inquiry hearing procedure.

The affidavit of service should be filed by the applicant before the hearing of the summons for directions, and we think it unnecessary for the subject to be present at the first hearing. The court should also have the power to dismiss the application at the hearing of the summons for directions, or to give further directions. Where a person requires leave to initiate an inquiry, he should file an *ex parte* originating summons for such leave, and his affidavit should contain all the particulars required in paragraph 70.

72. We recommend that guardians and trustees should be encouraged to apply for further directions from the court at any time during the duration of an order of guardianship or trusteeship on any question respecting a subject or respecting the management or administration of his estate. To avoid unnecessary paperwork, we suggest that such applications for directions should be made *ex parte*, with the court of course retaining the discretion to order service of notice of the application on such parties as it deems necessary. We recommend the law specifically provides that if a guardian or trustee acts upon the opinion, advice or direction given by the court (or perhaps a Family court, or the Public Trustee?), then the guardian or trustee should be deemed, so far as his own responsibility is

concerned, to have discharged his duty as guardian or trustee in respect of the subject matter of the opinion, advice or direction[35].

The Hearing

73. We were agreed that the actual hearing of the application should be conducted *in camera* for the protection of the subject, and his family, particularly in the event that the applicant should fail in his application.

74. In general, we recommend that the court should be given the discretion and flexibility to decide how the inquiry should be conducted, with the general procedure being settled and made clear to the applicant and interested parties at the stage of the summons for directions.

Personal Appearance by Subject

75. We recommend that as a general rule, the subject is to be present in person at the hearing, unless leave to do otherwise is obtained from the court, which leave should not be given unless the court is satisfied that there is good reason (for instance, if the subject is seriously ill or unconscious).

Joinder of Additional Parties

76. We recommend that the court should have the power at any time during the inquiry to order the applicant or any person served who is opposing the

application to produce any particular witness or document or report which the court considers may provide evidence or otherwise assist the court in its decision.

Orders for Medical Examinations

77. Likewise, the court should be empowered to refer or send the subject for such further medical examination or investigation by such registered medical practitioner, psychologist, social worker or such other appropriate professional assessor as may be nominated, appointed or approved by the court. Such an appropriate professional assessor may be suggested by the applicant, or by the court itself. The expense of such an examination or investigation should be borne by the applicant in the first instance, but the court should be empowered to order that these expenses be reimbursed by the subject or by any other person whom the court may consider should bear the liability for the expenses.

Interim Preservation of Property

78. When an application for the appointment of a guardian or trustee has been made, or is pending, the court shall have the power to issue an interim order or injunction to prevent the disposal of the subject's property, or for its preservation in the interim, and to give such other interim directions in relation to the care and welfare of the person, and of his assets, as the court thinks appropriate.

Appeal

79. An appeal from any order of the court arising from the inquiry should be to the Court of Appeal as for other appeals from the High Court in its civil jurisdiction.

Administration Bond

80. We think that it is unnecessary to impose any general requirement for security to be given by the applicant. However, the court should have power to order security, regard being given to the relationship between the subject and the applicant, the size of the subject's estate, and the general likelihood of the proposed guardian or trustee acting in the best interests of the subject. Even if security is to be ordered, we recommend that this take the form of a bond similar to an administration bond in which no monies are required to be paid up front to any party or into any account.

VIII. ADVANCE POWERS OF ATTORNEY

Advance Powers of Attorney

81. One consequence of recognising the principle of autonomy and self-determination is that the law should respect the right of an individual to declare in advance of his becoming incapacitated who he wants to take care of him when he becomes incapacitated. This principle is now well-established in the common law, as well as in our Advanced Medical Directive Act. We think that the law ought to

encourage persons to think about who they want to be appointed as their guardian or trustee (or both) if they should become incompetent (as for example, if they have been diagnosed to be in the early stages of a slow but irreversible degenerative disease which will inevitably lead to a long period of mental incapacity) by providing for a simpler procedure for the appointment of a guardian or a trustee if they have expressed such wishes in advance.

82. We recommend that such advance directives ought to be accommodated and honoured through statutory provision for the recognition and registration of advance powers of attorney granted by a subject in advance of the subject becoming incompetent or incapacitated. Under this scheme, if a person executes an advance power of attorney against the time when he becomes incapacitated, and in which he specifies who should be (in effect) the guardian of his person, and the trustee of his assets upon his lapsing into such incapacity, the law will then honour his wishes by directing the court to have regard to his wishes and give effect to the terms of the power of attorney as effectively as possible in a mental incapacity inquiry under the proposed new law. To avoid confusion with other forms of continuing powers of attorney, we recommend that such a power of attorney be called an "advance power of attorney"[36].

Simplified Procedure for Donees

83. We recommend that a simplified procedure be made available to a donee under such a power of attorney for the appointment of the donee as the guardian or the

trustee as the case may be, and as specified in the power of attorney. For example, the court could dispense with service to most of the parties which an applicant would otherwise have to serve, and the power of attorney itself could be substituted for many of the documents or requirements which the applicant would otherwise be required to meet or file. The object of simplifying the procedure for applicants who are donees under a power of attorney would include the public policy objective of encouraging donors to make advance arrangements.

Safeguards

84. Certain safeguards would nonetheless still be necessary. We suggest that at the minimum, the requirements of service on the subject and his close relatives should not be dispensed with; nor should the requirement of the subject being produced in person where practicable.

Registration

85. We also take the view that provision for the registration of powers of attorney should be made. One such procedure might be for a donee to apply to the court for registration, with personal service on the donor being required. If the donor does not file a notice of objection within 30 days after service, the court shall register the advance power of attorney. If the donor raises any objections at all, the court should refuse permission to register the power of attorney.

86. A register of the powers of attorney so registered by the court ought to be maintained for public inspection.

87. Registration of the power of attorney does not remove the necessity for the final trigger, before a donee may be appointed a guardian or trustee on the strength of the power of attorney: the court still has to make the determination of incapacity called for in the earlier part of this Report. If the court on inquiry comes to the conclusion that the donor retains some functional capacity to make decisions in relation to some matters, but not others, a court may notwithstanding the terms of the power of attorney grant only limited powers or a limited guardianship or limited trusteeship to the donee.

Powers to be Granted to Donees

88. **Particular Powers.** In determining the kind and extent of powers to be granted to a guardian or a trustee who is a donee under a power of attorney, the court should have primary regard for the intentions of the donor as expressed in the power of attorney. In general, the court should be slow to grant powers expressly excluded by the donor, unless the donee can demonstrate to the satisfaction of the court that such would be necessary to carry out the intentions of the donor.

89. **General Powers.** In addition to the general powers which a court would be entitled to grant to a general guardian or a general trustee as described earlier in this Report, a court should be at liberty to grant:

(a) such other powers as the subject would himself be entitled to personally exercise as are expressly stipulated in the power of attorney; and

(b) subject to the absolute discretion of the court, such other powers which we may have expressed the view that an ordinary general guardian or trustee (not being a donee under a power of attorney) should generally not have. For example, if a donor specifically choses to leave the matter of the settlement of his testamentary disposition by will, or the matter of his CPF nominations to a donee, or matters relating to divorce, we see no objection to the donee-guardian or the donee-trustee being empowered to do so, provided always that the power sought to be exercised or granted should always be a power or an act which the donor could himself lawfully do or exercise if he were not incapacitated.

The Hon. Justice Judith Prakash
Supreme Court, Singapore

Assoc. Prof. Terry Kaan
Faculty of Law, NUS

Ms Teoh Ai Lin
District Judge

Mr Hri Kumar
Messrs Drew & Napier

Mr Chew Kei-Jin
Messrs Tan, Rajah & Cheah

November 1999

Appendix

The NCSS Report

1. The NCSS Report deals primarily with the needs of intellectually disabled people, and the perceived shortcomings of the MDTA as a statutory framework for the care and protection of the intellectually disabled. This concern is, of course, entirely appropriate and directly relevant to the mission and work of the NCSS.

2. However, intellectually disabled people comprise but one of the many varied categories of persons who may suffer from less than full capacity in the eyes of the law. In our Report, we have sought to advance a comprehensive statutory framework in which the law can address all forms of civil incapacity, and in which the law can offer care and protection to persons suffering from any kind or degree of incapacity, irrespective of the aetiology of the incapacity. We have therefore focussed less on the categorisation of types of incapacity, than on modern concepts of legal incapacity itself.

3. We note that the NCSS Report recommends the Hong Kong Mental Health Ordinance (Cap. 136) as amended by the Hong Kong Mental Health (Amendment) Ordinance 1997 as being "suitable for local adaption". With respect, we are unable to agree. The Hong Kong Ordinance appears to us to be largely based on the English Mental Health Acts (principally 1959 and 1983), and like our current MDTA, approaches the issue of mental incapacity primarily from the perspective of mental disorders and mental handicaps. For the many reasons outlined in our Report, this approach appears to us to be

undesirable. In essence, it simply but incrementally liberalises and broadens the statutory regime in the existing MDTA without addressing the wider issues and classes of excluded persons which we have described in our Report. We note in particular that for these and other reasons, the English Law Commission has recommended that the current Mental Health Acts should be entirely repealed in favour of a new and comprehensive piece of legislation in the terms of their draft Mental Capacity Bill.

4. In our view, the definition of mental incapacity in the Hong Kong Ordinances (which follow that of the English Acts) is inadequate as it remains centred around the concepts of "mental disorder" and "mental handicap". We have described in our Report why it is undesirable that the definition of mental incapacity should be restricted to categories of mental illness, whether congenital or pathological in origin.

5. The NCSS has, however, raised some concerns which are also shared by us. These are addressed in our Report. We agree, for instance, that it is unhelpful to stigmatise incapacity by linking incapacity to mental illnesses or disorders. We also agree that a public office be constituted to act as statutory guardians in cases where there are no suitable or willing volunteer guardians – both we and the NCSS have suggested that the powers and duties of the Public Trustee should be extended to this end. We also agree that it is important that the law address issues of consent for medical (and dental) treatment, and we have so provided in our Report.

6. We have the following observations on the amendments to the MDTA recommended by the NCSS, and summarised in Chapter 2 at pages 8 to 11 of the NCSS Report:

- Recommendations 1, 2 and 3: This is unnecessary, because our proposal is to unlink mental illness or disability from mental incapacity. We are of the view that distinguishing between the aetiology and degree of various kinds of mental illness and disability is less useful than defining incapacity from the general perspective of the subject's ability to understand and to make decisions for himself, regardless of the aetiology and degree of his disability. We note that these definitions of the Hong Kong ordinances are based on the English Mental Health Acts, which the English Law Commission has recommended be repealed in favour of a law modelled on their draft Mental Incapacity Bill.
- Recommendation 4: The NCSS' recommendations in relation to destitute persons may be more appropriately implemented through the amendment of the Destitute Persons Act (Cap. 78), rather than through the MDTA.
- Recommendation 5: We agree with this recommendation, and have already provided for it in our Report.
- Recommendation 6: We have already suggested that where no willing or suitable volunteer guardians can be found for intellectually-disabled persons, the Public Trustee ought have the power to refer such intellectually-disabled persons to the Director of Social Welfare for care and protection. Indeed, the same object may well be achieved by amending section 12 of the Destitute Persons Act to make it less onerous for relatives and friends who are minded to take destitute persons into their care. As it currently stands, section 12 requires relatives and friends who wish to assume responsibility for the care of destitute persons to give security to the Director of Social Welfare before such a destitute person may be discharged into their care. Section 12 also requires such relatives or friends to inform the Director of Social Welfare within 24 hours of their "ceasing to care and support for such discharged person" under pain of

criminal sanctions (imprisonment or fine, or both). We think that this is too onerous, and a great disincentive towards voluntarism.

- Recommendations 7, 8 and 9: We have already addressed these issues in our Report. We agree with the principle expressed in Recommendation 9.
- Recommendations 10 and 11: We think it is unnecessary and undesirable to include such details in the principal Act. These are matters more appropriately dealt with through regulations made by the Minister under the Act. Recommendation 10 may perhaps be more appropriately implemented through regulations under the Destitute Persons Act.
- Recommendation 12: We agree that the law should make clear provisions for consent to medical and dental treatment on behalf of incapacitated persons. We have addressed these issues at length in our Report. We note that the NCSS limits its recommendation to conditions "of a serious nature" – we would prefer a more flexible approach based on the best interests of the subject, and the discretion of the courts in determining the scope of powers to be granted to a guardian in respect of medical treatment.
- Recommendation 13: We agree, and have already provided for this.
- Recommendation 14: We take the view that such a statutory panel of experts is unnecessary. If there is an operational need for such a panel, it could be easily and more flexibly implemented by way of regulations or Ministry-level practice directives. Again, not all incapacitated persons are mentally ill or intellectually disabled: such a statutory panel would be irrelevant to the needs of subjects who are incapacitated through causes other than mental illness or congenital intellectual disability (for instance, strokes or unconsciousness attendant on a terminal illness).
- Recommendation 15: We agree, and have already provided for this.
- Recommendations 16 and 17: These are policy issues which are outside our terms of reference. We suggest that if legal rules in this respect are

necessary, they are best implemented through regulations under the relevant Act (either the proposed Mental Incapacity Act, or the revised MDTA (with Part I repealed), or other Acts such as the Destitute Persons Act).

- Recommendation 18: This does not address our concerns that incapacity is a concept that covers more than just mental health.
- Recommendations 19 to 22 deal with proposals for amendments to Acts other than the MDTA, and are outside our terms of reference.

Notes

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[1] Ordinance 33 of 1935 of the Straits Settlements (Cap. 44, Rev. Ed. 1936 of the Laws of the Straits Settlements).

[2] The Lunatic Asylums Ordinance 1858 (Ord. 8 of 1958), and the Lunatic Asylums Ordinance 1920 (Ord. 4 of 1920). These two ordinances dealt mainly with the apprehension and detention of the insane in asylums.

[3] Lord Brandon in *In re F. (Mental Subject: Sterilisation)* (House of Lords) [1989] 2 WLR 1025, at 1068-9.

[4] Section 17(e), Supreme Court of Judicature Act (Cap. 322). If the procedure in the MDTA is to be revised, and in particular if the terms used to described persons with mental disabilities are to be changed, a similar revision of this provision of the Supreme Court of Judicature Act should perhaps be considered.

[5] *In re F. (Mental Subject: Sterilisation)* (House of Lords) [1989] 2 WLR 1025, at 1077.

[6] Section 108, Lunacy Act 1890.

[7] Section 108, Lunacy Act 1890; and Section 9, MDTA.

[8] For a full discussion, see *Airedale National Health Trust v. Anthony Bland* [1993] 2 WLR 316 (House of Lords)

[9] Lord Scarman in *Sidaway v. Board of Governors of the Bethlem Royal Hospital and Maudsley Hospital* [1985] AC 871, at 882, approved and applied in *Airedale v. Bland* [1993] 2 WLR 316 at 367 by Lord Goff. *Cf* also The Law Commission in *Consultation Paper No. 129: Mentally Incapacitated Adults and Decision-Making, Medical Treatment and Research* (1993: HMSO, London) at paragraph 2.1.

[10] See especially sections 3, 12 and 13 of the Advance Medical Directive Act (Cap 4A), and Annex 4 of the *Report of the National Medical Ethics Committee on Advance Medical Directives* (1995: National Medical Ethics Committee, Ministry of Health, Singapore).

[11] See Part III of the English Law Commission's Report on Mental Incapacity, *Mental Incapacity: Item 9 of the Fourth Programme of Law Reform: Mentally Incapacitated Adults* (1995) Law Commission No. 231 Cm 189 (HMSO), hereinafter "the 1995 Report".

[12] *In re C (Adult: Refusal of Treatment)* [1994] 1 WLR 290 (Fam.)

[13] The 1995 Report (*see above)*, Part III (*"Two Fundamental Concepts: Lack of Capacity and Best Interests"*).

[14] *Cf*. Section 94(1), Lunacy Act 1890.

[15] Section 4, MDTA.

[16] See *In re C (Adult: Refusal of Treatment)* [1994] 1 WLR 290 (Fam.), and our comments in the Survey, above.

[17] Cap. 4A.

[18] We note with interest the provisions of Section 11 of the draft Mental Incapacity Bill.

[19] See Section 100 of the Mental Health Act 1996 of Western Australia, which defines it as: "(a) the use of a surgical technique or procedure, or of intracerebral electrodes, to create in a person's brain a lesion that, by itself or together with any other lesion created at the same time or any other time, is intended to permanently alter the thoughts, emotions, or certain behaviour of the person; or (b) the use of intracerebral electrodes to stimulate a person's brain, without creating a lesion, with the intent that, by itself or together with any other such stimulation at the same time or any other time, the stimulation will, temporarily, influence or alter the thoughts, emotions, or certain behaviour of the person", with the behaviour referred to in subsection (1) (a) and (b) not to include "behaviour considered to be secondary to a paroxysmal cerebral dysrhythmia."

[20] For example, Section 99 of the Mental Health Act 1996 of Western Australia provides that: "(1) A person is not to administer to or perform on another person --

(a) deep sleep therapy; or
(b) insulin coma or sub-coma therapy.

(2) A person who contravenes subsection (1) commits a crime.
Penalty: Imprisonment for 5 years."

21 See the principles laid down by the Supreme Court of Canada in *Re Eve* 31 D.L.R. (4th) (1986).

22 Cap. 337.

23 See Section 27 of the draft Mental Incapacity Act.

24 We adopt Section 27 of the draft Mental Incapacity Act.

25 The common law apparently takes the approach that where "a person's property and affairs have become subject to the jurisdiction of the Court of Protection, he cannot deal with them in any way which is inconsistent with the court's powers; hence any transaction entered into during this time is void, irrespective of whether or not he actually had the capacity to enter into it, and, it would appear, irrespective of whether or not the other contracting party knew that his affairs were under the court's control" (Halsbury *Laws: Mental Health: Vol 30*, at paragraph 1394). Clearly, contracts entered into after the registration of the order should be void. But it is not clear how the common law would deal with contracts entered into after the making of the order but before its registration, particularly if the third party had no actual notice of the order. If the principle outlined in Halsbury is applied, it appears that such contracts may also be void, thus begging the question as to what effect registration would achieve at common law. The common law is also unclear as to the status of contracts entered into *before* the making of the order, but under such circumstances that, although the third party has no actual notice of any lack of capacity on the part of the subject, there is nonetheless some reason for the third party to suspect that the capacity of the subject may at least be deficient in some respect. If our proposals for legislation are adopted, it may be desirable that these issues be addressed either in the proposed Act or by way of amendment to already existing legislation. We acknowledge with thanks the advice of Associate Professor Tan Cheng Han and Associate Professor Tan Yock Lin, members of the Law Reform Committee, on this point.

26 We adopt and acknowledge with thanks these suggestions of Associate Professor Tan Cheng Han.

27 We have taken this from Section 32 of the Dependent Adults Act of Alberta.

28 Cap. 260.

29 Section 5, Public Trustee Act.

30 Section 3(1), the draft Mental Incapacity Bill.

31 Section 11 of the Dependent Adults Act, Alberta.

32 See our comments at paragraph 72 above.

33 We note with interest the provisions of Chapter III of the Mental Incapacity Bill proposed by the Law Reform Commission.

34 We use the words of Section 47 of the Mental Incapacity Bill.

35 We take this provision from Section 45(2) of the Dependent Adults Act of Alberta.

36 We suggest that advice be taken on the impact of the proposed advance power of attorney on Muslim personal law, although we do not ourselves foresee any difficulties in this area because a donor would be entitled to donate such powers as he would possess himself, and the advance power of attorney concept does not touch on the disposition and distribution of property after death.