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“Enabling Citizens to Plan for Incapacity”

by

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[Note: This paper contains the text of my presentation as delivered, with PowerPoint slides interspersed¹ and footnotes added, and with some relevant material added as an Appendix.]

Annyeonghasimnikka!

Thank you Professor C Je for your kind introduction, and for all that you have done for the splendid success of this Congress, and for your guests, in my case including organising two days of exploration of your fascinating country.

A few years ago, on an adventurous trip to another country, I found that I was walking into a large area that on the map was a blank space, with the single word “unexplored”.

My topic today is an exploration and development – an exploration and development of techniques and principles of worldwide importance. The techniques are all within a group that I call “voluntary measures”. I shall describe principles – at both European and international level – which are driving the exploration and development of these measures, taking us into a large blank space.

In Europe, we established continent-wide principles. Then we reviewed and assessed the great diversity in the extent to which two particular techniques have been developed; and the ways in which they have been developed. From that work we are now seeking to shape the way ahead. If I can persuade all of you, everywhere, of the worldwide importance of this work, I invite all of you to contribute your own experience and thoughts, and to join this process of exploration and development.

I shall start with definitions in Council of Europe Recommendation CM/Rec(2009)11 on principles concerning powers of attorney and advance directives for incapacity. In that Recommendation we adopted “**continuing power of attorney**” to mean:

“A mandate given by a capable adult with the purpose that it shall remain in force, or enter into force, in the event of the granter’s incapacity” (Principle 2.1)

¹ The original PowerPoint slides were in both English and Korean. A version of this paper with Korean text included is available on request.

A second concept is “**advance directive**”, defined as:

“Instructions given or wishes made by a capable adult concerning issues that may arise in the event of his or her incapacity” (Principle 2.3)

In the case of powers of attorney, the definition is supplemented by Principle 3:

“States should consider whether it should be possible for a continuing power of attorney to cover economic and financial matters, as well as health, welfare and other personal matters, and whether some particular matters should be excluded”

The definition of advance directives is supplemented by Principle 14:

“Advance directives may apply to health, welfare and other personal matters, to economic and financial matters, and to the choice of a guardian, should one be appointed”

The scope of these definitions is broad. Both techniques may cover a wide range of matters. Continuing powers of attorney may either enter into force before impairment of relevant capabilities and continue thereafter, or enter into force upon loss of relevant capabilities. Advance directives may be either binding or non-binding. In some jurisdictions, an advance directive may nominate a guardian if one should be appointed, and in some may also stipulate other provisions and limitations of any guardianship order. These possibilities might be seen as a half-way house between powers of attorney and guardianship, with some advantages of both.

Viewed in 2018, one obvious limitation of these definitions is the concept of documents entered during capacity, and operable “in the event of incapacity”. On terminology, “capacity” and “incapacity” are used in what until recently was the narrow modern sense, in the English language, of factual capability and incapability. In reality, incapability can occasionally be the sudden consequence of a serious injury or illness. Usually, impairment of relevant capabilities is partial, and often variable or progressive.

A huge space, on the map of our subject, lies between rigid concepts of supposed full capability, on the one side, and of supposed complete incapability, on the other. Historically, we have had little more to fill that space than, in laws, a bland presumption of capacity; far too often contradicted, in practice, by a presumption of incapacity. In terms of the practicalities of workable measures, it is still largely unexplored territory. It is where current explorations are taking us. Fortunately, we can be guided by the same principles that have brought us this far. I shall start with relevant European principles. Recommendation (2009)¹¹ commences as follows:

Principle 1 – Promotion of self-determination

- 1. States should promote self-determination for capable adults in the event of their future incapacity, by means of continuing powers of attorney and advance directives.*
- 2. In accordance with the principles of self-determination and subsidiarity, states should consider giving those methods priority over other measures of protection.*

These are a development from Principle 7 of the “parent” Recommendation (99)4 on principles concerning the legal protection of incapable adults. Principle 7 of that Recommendation reads:

“Consideration should be given to the need to provide for, and regulate, legal arrangements which a person who is still capable can take to provide for any subsequent incapacity.”

Where the 1999 Recommendation relates to people with impaired mental and intellectual capabilities regardless of age, Recommendation (2014)2 on the promotion of human rights of older persons relates to older people regardless of any such impairments. It also highlights principles of autonomy and participation.

Principle 9 of the 2014 Recommendation outlines the rights of older people to respect and autonomy:

“Older persons have the right to respect for their inherent dignity. They are entitled to lead their lives independently, in a self-determined and autonomous manner. This encompasses, inter alia, the taking of independent decisions with regard to all issues which concern them, including those regarding their property, income, finances, place of residence, health, medical treatment or care, as well as funeral arrangements. Any limitations should be proportionate to the specific situation, and provided with appropriate and effective safeguards to prevent abuse and discrimination.”

Principle 13 declares their right to choose a supporter, acting in conformity with the person’s will and preferences:

“Older persons have the right to receive appropriate support in taking their decisions and exercising their legal capacity when they feel the need for it, including by appointing a trusted third party of their own choice to help with their decisions. This appointed party should support the older person on his or her request and in conformity with his or her will and preferences.”

Principle 14 requires legislative provision for voluntary measures:

“Member States should provide for legislation which allows older persons to regulate their affairs in the event that they are unable to express their instructions at a later stage.”

A follow-up review of the 2009 Recommendation has recently been completed. The European Steering Committee for Human Rights has been conducting a follow-up review of the 2014 Recommendation. Published on its website is the draft Report on the implementation of the 2014 Recommendation tabled at that Committee’s plenary meeting in June of this year. Paragraph 40 of that draft Report commends valuable efforts that have been devoted by member states, but asserts that:

“More attention should be paid to ... promoting self-determination of older persons and enabling them to make their own choices and lead independent lives in their familiar surroundings for as long as they wish and are able.”

After referring to the review of the 2009 Recommendation, paragraph 40 continues:

“Indeed, older persons may entail serious human rights violations stemming from the disregard of their dignity, and member States should thus continue reflecting on whether restrictions to older persons’ autonomy and independence are necessary or justifiable and, if so, in which cases.”

At international level, the main instrument is of course the United Nations Convention on the Rights of Persons with Disabilities (“the Disability Convention”). It is my topic tomorrow, so I shall condense my references to it today. It is however of great relevance to today’s topic, even although it is strangely silent about voluntary measures such as continuing powers of attorney; and as a generalisation, such measures have received little attention in the context of the Disability Convention, including in the comments of the UN Committee on the Rights of Persons with Disabilities (“the UN Committee”).

The fundamental purpose of the Disability Convention is:

“... to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities ...” (Article 1)

The definition of “discrimination on the basis of disability” in Article 2² contains the conundrum that although “reasonable accommodation” is a form of discrimination, “denial of reasonable accommodation” is included in the definition of “discrimination on the basis of disability”. Of course, reasonable accommodation must be provided where necessary, but discrimination is reduced by adopting as far as possible the concept of “universal design”, defined in Article 2. Rather surprisingly, the imperatives in the Disability Convention in relation to universal design are relatively weak, being limited to the “general obligation” in Article 4.f:

“f. To undertake or promote research and development of universally designed goods, services, equipment and facilities, as defined in article 2 of the present Convention, which should require the minimum possible adaptation and the least cost to meet the specific needs of a person with disabilities, to promote their availability and use, and to promote universal design in the development of standards and guidelines;”

However, the obligation to undertake or promote research and development of universally designed services and facilities is sufficient for our purposes!

Article 12 of the Disability Convention reaffirms the legal personhood of persons with disabilities. It requires States Parties to recognise their right to enjoy full legal capacity and to ensure access to the support they may require in exercising their legal capacity. It also requires States Parties to ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards, including to ensure respect for the rights, will and preferences of the person. These international principles, as with the European principles, thrust us in the direction of what I term “voluntary measures”. A further imperative to explore and develop voluntary measures is provided by paragraph 7 of General Comment No 1 by the UN Committee, which calls for the abolition of all involuntary measures.

If we divide “measures that relate to the exercise of legal capacity”, as they are described in the Disability Convention (Article 12.4), into two principal categories, we can call them “voluntary measures” and “involuntary measures”. These terms were not originally mine, but I have adopted them. Voluntary measures are those put in place by people themselves. Involuntary measures are put in place either by someone else such as a court or an authority (guardianship being an example), or in some states by

² *“any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation;”*

automatic operation of law – the automatic right of relatives or others to operate a form of substitute decision-making with no significant procedural or operational safeguards.

As with all general descriptions, these terms represent centres of emphasis, and there is not always a clearcut boundary between them. As I have mentioned, advance directives may introduce elements of voluntariness into guardianship arrangements. Operation of a continuing power of attorney, if the granter's capabilities have become significantly impaired, may involve aspects of involuntariness, particularly if an attorney fails to apply assiduously the best interpretation of the granter's will and preferences.

Voluntary measures can in turn be divided into two overlapping categories – unilateral measures such as advance directives, and bilateral measures such as continuing powers of attorney. They can be alternatives, or combined either as separate documents or in the same document.

So, our principal direction of travel should be to explore and develop voluntary measures; to apply them so as best to support the principles of autonomy and self-determination when they are operated, as well as when they are created; and to apply the safeguards required by Article 12 of the Disability Convention both at time of creation and during operation. While those requirements and safeguards are expressed in the context of people with disabilities, they should be applied universally, without discrimination on grounds of being deemed to have, or not to have, a disability.

At this point, a little about my personal involvement. I was a member of the working party which drafted the 2009 Recommendation. Then the 2009 Recommendation was selected for review of implementation. That review was included in the programme of work for the European Committee on Legal Cooperation for 2016 and 2017, approved by the Council of Ministers. I was appointed consultant to carry out the review. I went through the Recommendation Principle by Principle, and drafted a questionnaire, to find out how each member state was getting on with implementing the Recommendation. For some states the resource implications of the questionnaire might have been daunting, so I also prepared a shorter version. Both versions asked further questions relevant to fully achieving the purposes of the 2009 Recommendation. My final Report is entitled "Enabling Citizens to Plan for Incapacity" and was published by Council of Europe on its website in June of this year at:

<https://www.coe.int/en/web/cdcj/activities/powers-attorney-advance-directives-incapacity>³.

I concluded that implementation of the 2009 Recommendation is work-in-progress. Achievements so far are commendable. Much has been done, and is being done, towards promoting self-determination by providing and refining voluntary measures, and encouraging their use. But across Europe the outcomes envisaged by the Recommendation are only at an early state of achievement. Most member states still have much to do. There is much diversity in what is available, what is not – or not yet – available, and the extent to which voluntary measures are used. There is diversity in provisions, procedures and safeguards. Four particular conclusions, though drawn from my European exercise, probably apply worldwide. They are:

- 1) Provision for advance directives, compared with continuing powers of attorney, is under-developed.

³ The Preface and Executive Summary of the Report are reproduced as the Appendix to this paper.

- 2) There is a lack of requirements strong enough to ensure that, in accordance with the Disability Convention, during operation of continuing powers of attorney, granters are informed and consulted, and their wishes and preferences identified and respected.
- 3) There is insufficient clarity as to how to balance expressions of self-determination when voluntary measures are created, with contradictory expressions when they are subsequently in operation.
- 4) Promotion of self-determination requires more than availability of voluntary measures in legislation. It requires:
 - availability of fully inclusive forms of document;
 - procedures to establish them;
 - proactive promotion of their use; and
 - removal of barriers to their effective operation, both within states, and in cross-border situations.

All of these require to be developed further in many states.

The Report contains six proposals and 30 suggestions. See the Report itself for all of them. Today I shall highlight some main points.

In the practical world, the imperative to develop voluntary measures, and to do so in ways compliant with relevant human rights principles, raises one further simple and important principle. I call it the principle of “certainty and transactional effectiveness”. Theoretical perfection is of little use if the results are not readily understood and acted upon by the bank clerk trained to avoid improper transactions, or the healthcare professional concerned to avoid proceeding without proper consent, or the demands upon both to safeguard privacy and data protection. Measures, both voluntary and involuntary, must work well in practice.

I proposed that member states facilitate and encourage the use of continuing powers of attorney and advance directives in forms helpful to people with some relevant disabilities, including in easy-read form. They should also encourage the maximisation of support to enable people with relevant disabilities to exercise their legal capacity by granting such instruments. Member states should facilitate and encourage the incorporation of supported decision-making and co-decision-making provisions in continuing powers of attorney; and Council of Europe should develop and issue guidance or recommendations to assist implementation of these proposals.

These points – all contained in proposal 5 in the Report – seek to help fill that large empty space between supposed capability and incapability. They seek to maximise the availability of voluntary measures, and to incorporate the newer forms of voluntary measure that are emerging.

An appointment of a supporter can be combined with a power of attorney, or done separately. It is useful, however, for the appointment to be disability neutral, in the sense that it will subsist regardless of any determinations of incapability. The following is based on standard wording that I drafted some years ago, and that has been used in practice:

“I appoint my # to be my supporter and co-decision-maker. In relation to the whole or any part(s) of any act or decision by or for me, his/her opinion shall be definitive as to what are (a) my competent acts or decisions, and/or (b) the best interpretation of my will and preferences, and/or

(c) whether or not I have been subjected to undue influence; except if and to the extent that his/her opinion is shown to be manifestly incorrect. I instruct and authorise that he/she shall, if and to the extent that he/she so requests, be provided with all or any data or information relevant to me, whether confidential or not, including unredacted copies of any writings, documents or similar.”

The essence of a co-decision-making arrangement is that, again, any determinations of incapability become irrelevant. Here, however, for the style which I created it is necessary that the co-decision-maker should also be attorney, with the full powers conferred upon the attorney. The relevant wording is as follows:

“Any act or decision by me and him/her jointly shall be valid and binding, and shall be recognised by all parties as such, on the basis that it is my valid and effective act or decision to the extent that I have relevant capability and his/hers, acting as my attorney on my behalf, to the extent that I do not.”

In my document, both of the above are contained in the same paragraph, which concludes as follows:

“The provisions of this paragraph are subject to the proviso that he/she shall have provided all reasonable support to me in acting, in deciding, and in formulating my will and preferences, and in communicating all of these.”

Other main points in the proposals reflect the conclusions that I have already described. Member states should, on an ongoing basis, continue to review and develop provisions and practices to promote self-determination by means of continuing powers of attorney and advance directives. They should have regard to solutions and experience of other states. They should continue to share information, initiatives and experience. They should promote joint projects, conferences and the like.

Provision for advance directives should be developed towards utilising their full potential scope; always keeping clear the distinction between the categories of instructions given, and wishes made; all to be supported by promotion of research and consideration at European level, and issue of guidance and recommendations.

These points are included in proposals 1 and 2.

Proposals 3 and 4 confront an issue that causes me ongoing concern. It is absolutely not enough simply to characterise voluntary measures as a means to achieve human rights compliance. They contain the potential for violation of those rights. In proposal 3, I proposed that in all their acts and decisions as attorneys, attorneys should be required to take all practicable steps to ascertain the will and preferences of the granter, or failing that the best interpretation of the granter’s will and preferences; they should give effect to the will and preferences of the granter (or best interpretation) except only where stringent criteria for doing otherwise, set out in law, are satisfied; and they must inform and consult the granter, and support the granter to formulate and communicate the granter’s will and preferences.

But in relation to both unilateral and bilateral voluntary measures, there is still the challenge of conflicts between expressions of will at time of granting, and at time of operation. In the artificial world of complete capability and complete incapability, one could say that my subsequent change of will overrides my previous will if I am deemed to be “capable”, and does not if I am not. That may satisfy third parties

seeking certainty and transactional effectiveness. It won't satisfy me if my will is being overridden because of an appointment or directive made in the past. Come back tomorrow for my current thoughts on key issues of past, present and future will. Meantime, my proposal 4 simply suggests clarification of these issues.

My final proposal 6 suggested initiatives for proactive promotion of the use of continuing powers of attorney and advance directives; for review of **involuntary** measures for compliance with human rights requirements, and whether **they** inhibit uptake of voluntary measures; and for review of any barriers, internally or in cross-border situations, to the full recognition and effectiveness in practice of continuing powers of attorney and advance directives.

That last point leads to the particular suggestion, from that long list of 30, which I wish to highlight in conclusion. More and more people cross borders, temporarily or permanently, or have assets or family spread across borders. Hague Convention 35 on the International Protection of Adults is there to regulate such situations. Disappointingly few countries, all of them European, have ratified Hague 35. Coming from the very first country to have ratified – Scotland – with a nearest neighbour which has not yet ratified – England – I can vouch for the practical value of ratification for people in situations where the last thing they want is avoidable bureaucratic difficulty in cross-border situations. If you come from a state anywhere in the world which has not yet ratified, please go home and urge ratification.

Thank you for listening, and please remember my invitation to join in that challenging and rewarding exploration and development which I have outlined.

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6th November 2018

APPENDIX

Report to Council of Europe “Enabling Citizens to Plan for Incapacity”

[The Preface which I wrote to the Report appears online as the first page, including two links. The link to the Report itself is at the foot of that page. That online Preface is as follows:]

To each citizen of Europe: planning for incapacity

Have you made arrangements for how you will be looked after and your property and finances managed if you become incapable of doing so yourself? Will those arrangements ensure that your wishes are respected? Will they respect your individuality and values? Will you be protected from their misuse?

As citizens of Europe we all have rights to self-determination. These are our rights to manage our lives and decide for ourselves. They include the right to manage and spend our own money, and to manage our property. They include our right to decide personal matters, ranging from daily decisions about what to wear and to eat, and where to go, through to major decisions about healthcare, where to live, which people to have close in our life, and so on.

If you lose the ability to deal with some or all of these things, there are two possibilities. The first is that arrangements that you have put in place will cover the position. These are “voluntary measures”. The second possibility is that measures not of your own making are put in place by legal procedure or by operation of law. These are “involuntary measures”.

In accordance with the principle of self-determination, the Council of Europe recommends that member states give voluntary measures priority over involuntary measures. The voluntary measures most commonly used in 2009, when the Committee of Ministers adopted its recommendation promoting self-determination, were powers of attorney and advance directives, and this is reflected in its title: [Recommendation CM/Rec\(2009\)11 on principles concerning continuing powers of attorney and advance directives for incapacity](#).

Recommendation CM/Rec(2009)11 was a pioneering instrument. The development of voluntary measures across Europe at the time was uneven and variable, although wherever they were available, ever-larger numbers of people used them. Further information on planning and arrangements for future incapacity can be found in the explanatory memorandum which accompanies CM/Rec(2009)11. The [European Committee on Legal Co-operation \(CDCJ\)](#) commissioned a review of the follow-up action by member states of the Council of Europe in relation to the implementation of the recommendation. This Report, entitled [Enabling citizens to plan for incapacity - a review of follow-up action taken by member states of the Council of Europe to Recommendation CM/Rec\(2009\)11](#), was prepared by Mr Adrian D. Ward (Scotland, United Kingdom) – adrian@adward.co.uk, and published in June 2018 in accordance with the decision of CDCJ (92nd meeting, 22-24 November 2017). The report includes the author’s proposals and suggestions for future action.

SELF-DETERMINING ARRANGEMENTS FOR FUTURE INCAPACITY: CONTINUING POWERS OF ATTORNEY AND ADVANCE DIRECTIVES

Self-determination is about taking control of all aspects of your life and ensuring that the people who care for you have your best interests at heart, and that they act in accordance with your wishes. It of course covers decisions about property, money and personal welfare. It also includes so much more: for example making decisions about when to seek help on health care, and whether to accept particular medical treatments that might be offered, or arranging to visit the dentist, finding out about pensions and benefits, and claiming them, knowing when your rights are being infringed or denied and doing something about it.

For all of us there is a risk of being unable to do some or all of these things without support, or at all. At an extreme, a sudden illness or injury could put you into a coma, perhaps with permanent brain damage after that. More commonly, ageing conditions can reduce our ability to act and decide for ourselves. Mental illness can do the same. There can be other causes.

By setting up a “**continuing power of attorney**”, you can decide who should support you, and should act and decide for you. You can say what you would want them to do, and how you would want them to do it. Others must accept the acts and decisions of the person you have chosen, as if they were your own acts and decisions. There are two types of continuing power of attorney, under which you are the **granter** and the person whom you appoint is the **attorney**:

- **Continuing power of attorney in economic and financial matters.** Here you will want someone to help with your finances, or manage your property, either now or in the future. You might prefer to have your own choice of arrangements, and to choose who should operate them.
- **Continuing power of attorney in health, welfare and other personal matters.** Here you will want a trusted person to make arrangements and take decisions to cover these more personal matters, if you should become unable to deal with them yourself.

As well as appointing someone, you can give direct instructions in some matters. You might want to make a statement to apply in future situations where it might otherwise become difficult or impossible for other people to find out what you want. You might want to record your wishes and preferences. Or you might want to give binding instructions. All such arrangements are **advance directives**.

Safeguards are needed to fulfil the principle of self-determination under all such arrangements. Your own true will and preferences need to be respected. Changes in your will and preferences need to be provided for. Legal effectiveness needs to be ensured. You need to be protected from possible abuses of such arrangements. Much of the Report on the review of the follow-up action to CM/Rec(2009)11 covers the developing ways in which such issues are being tackled. These developments are largely citizen-led. Subject to differing national cultures, they are all about choices. Many of them new choices. Choices for you.

ENABLING CITIZENS TO PLAN FOR INCAPACITY: MATTERS FOR LAWYERS, POLICY MAKERS, AND LEGISLATORS

A wealth of information and comment was provided by member states who contributed to the review. They did so mainly by completing questionnaires. The analysis of the replies formed the basis for the

[Report on the review of follow-up action taken by member states of the Council of Europe to Recommendation CM/Rec\(2009\)11](#). This information will be complemented by a dedicated space on the [CDCJ website](#) which will provide, as soon as it is available, information on relevant legislative developments and other changes in policy and practice in member states.

This information is all made freely available, to help shape improved practice now, and to shape future law reform in compliance with all relevant developing human rights norms. Make the most of it.

Executive Summary

Across Europe, implementation of Recommendation CM/Rec(2009)11 is work-in-progress. Achievements to date by member states are commendable. Much has been done, and continues to be done, by member states towards promoting self-determination for their citizens, by providing and refining voluntary measures, and encouraging their use.

The picture across Europe is however that outcomes envisaged by the Recommendation are only at an early stage of development, leaving most member states still with much to be done. It is also a picture of diversity, ranging from unavailability of continuing powers of attorney (“CPAs”) and/or advance directives, through to relatively wide-ranging provision for CPAs, and at least some provision for advance directives. There is also diversity in that some member states have legislation in force and in full operation, some have passed legislation which is not yet in operation, some have proposals before their legislatures, and some have proposals which are not yet before their legislatures. These categories are reflected in Table A in Appendix IV. Where CPAs and advance directives are available to citizens, there is diversity among member states as to the length of time for which they have been available, and remarkable diversity in the extent to which – so far as statistics have been provided – they are used. Relevant statistics appear in Table C in Appendix IV.

As at 1 September 2017, nine member states currently had in force all of the areas of relevant provision of (1) CPAs to cover economic and financial matters, (2) CPAs to cover health, welfare and other personal matters, and (3) advance directives as defined in Principle 2.3 of the Recommendation. One more state will have all of those areas of provision when legislation already passed comes into force. Only one member state, when legislation already passed comes fully into force, will have implemented all of the Principles identified as fundamental in this report.

Completed questionnaires, in the form in either Appendix I or Appendix II to this report, were received from 26 member states. They contributed a wealth of information, which has been correlated and analysed in this report. These responses to questionnaires (“Responses”) reflect great care and enthusiasm with which member states have analysed and addressed relevant issues in recent years. In addition to Responses, one abbreviated form, and further information from two further member states, were received, contributing further information contained in Table A.

The Principles in the Recommendation remain highly relevant. In a time of dynamic development across our continent, guided by the common Principles in the Recommendation, this report seeks to provide a starting-point for further collaborative progress. Member states are encouraged to continue to share information, initiatives and experience. Member states are encouraged to contact the Secretariat to the Directorate General of Human Rights and Rule of Law (“DGI Secretariat”) with proposals for joint projects, conferences and the like.

As well as the general need to continue collaboratively the work of full implementation of the Recommendation, particularly significant conclusions emerging from this review include:

- 1) Provision for advance directives, compared with CPAs, is under-developed. Nowhere is there clear legislative provision maximising the scope of self-determination by advance directives, so as, in conjunction with CPAs, to maximise the total range of provision for self-determination.
- 2) There are insufficiently strong requirements to ensure that, in accordance with the UN Convention on the Rights of Persons with Disabilities, during operation of CPAs granterers are informed and consulted, and their wishes and preferences identified and respected.
- 3) Europe-wide, there is insufficient clarity as to how to balance expressions of self-determination when voluntary measures are created, with inconsistent expressions when they are subsequently in operation.
- 4) Promotion of self-determination requires not only availability in legislation of voluntary measures, but availability of fully inclusive forms of document and procedures to establish them; proactive promotion of use of voluntary measures; and removal of barriers to their effective operation, both within member states and in cross-border situations. All of these aspects require to be developed further in many member states.

This report contains six proposals designed to address the foregoing issues, and 30 suggestions (see paragraphs 217 – 247), four of them directed to both Council of Europe and member states, and the remainder to member states. Some of those suggestions are at least partly supplementary to the proposals. The majority are free-standing.

The proposals set out below, and the suggestions appearing later in this report, have been drawn by the consultant from the information provided in this report, and from matters within his own knowledge. These proposals and suggestions are solely those of the author and do not necessarily reflect the views of CDCJ, the Council of Europe or its member states.

The proposals are:

PROPOSAL 1:

(A) – That all member states should, on an ongoing basis, continue to review and develop provisions and practices to promote self-determination for capable adults in the event of future incapacity by means of CPAs and advance directives.

(B) – That in doing so, member states should have regard to such assistance as may be provided by the solutions to issues, and experience in practice, of other states as described in this report; should continue to share information, initiatives and experience; and should where appropriate, and in conjunction with Council of Europe, promote joint projects, conferences and the like.

PROPOSAL 2:

(A) – That member states consider, in particular, developing provision for advance directives, as a component in the overall promotion of self-determination in conjunction with CPAs, having regard to the full potential scope of application of advance directives to all health, welfare and other personal matters, to economic and financial matters, and to the choice of a guardian should one be appointed; and with appropriate distinction between the categories of instructions given and wishes made.

(B) – That Council of Europe should consider promoting research and consideration at a European level, and issue of guidance or recommendations, with a view to assisting member states in implementing Proposal 2 (A).

PROPOSAL 3:

That member states review laws relating to CPAs to ensure –

(A) That in relation to all acts and decisions in their role as attorneys, attorneys are required to take all practicable steps to ascertain the will and preferences of the granter, or failing that the best interpretation of the will and preferences of the granter.

(B) That in their acts and decisions on behalf of the granter attorneys are required to give effect to the will and preferences of the granter (or best interpretation thereof) except only where stringent criteria for doing otherwise, set forth in law, are satisfied.

(C) That the requirement to inform and consult the granter on an ongoing basis includes a requirement (i) to present to the granter, in the form that the granter is most likely to understand, the information necessary to enable the granter to formulate and communicate his or her will and preferences, (ii) to provide the granter with all reasonable support towards enabling the granter to formulate and communicate the granter's will and preferences, and (iii) to keep the granter informed of acts and decisions taken and implemented.

PROPOSAL 4:

That Council of Europe give consideration to promoting discussion and research with a view to clarifying matters relevant to situations of conflict between the terms of a continuing power of attorney or advance directive, on the one hand, and on the other the apparent will and preferences of the granter at time of exercise of powers conferred by a CPA, or of implementation of instructions in an advance directive, or when wishes expressed in an advance directive are to be followed.

PROPOSAL 5:

(A) – That member states facilitate and encourage the use of continuing powers of attorney and advance directives in forms helpful to people with disabilities, including in easy-read form, and the maximisation of support to enable people with disabilities to exercise their legal capacity by granting CPAs and issuing advance directives.

(B) – That member states facilitate and encourage the incorporation of supported decision-making and co-decision-making provisions in continuing powers of attorney.

(C) – That Council of Europe develops and issues guidance or recommendations to assist member states in implementing Proposals 5 (A) and (B).

PROPOSAL 6:

That member states should:

(A) – Educate citizens about CPAs and advance directives, and proactively promote the granting of CPAs and the issue of advance directives.

(B) – Assess whether financial savings achieved by higher levels of uptake of CPAs and advance directives would make it economically prudent to fund such public education and promotion, and/or to subsidise the costs of granting CPAs and issuing advance directives.

(C) – Review whether all available involuntary measures comply with international human rights requirements, and whether they avoid inhibiting uptake of voluntary measures.

(D) – Review and address any barriers, internally or in cross-border situations, to the full recognition and effectiveness in practice of CPAs and advance directives.

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