

**COUNCIL OF EUROPE
COMMITTEE OF MINISTERS**

RECOMMENDATION No. R (99) 4¹

**OF THE COMMITTEE OF MINISTERS TO MEMBER STATES
ON PRINCIPLES CONCERNING THE LEGAL PROTECTION
OF INCAPABLE ADULTS**

*(Adopted by the Committee of Ministers on 23 February 1999
at the 660th meeting of the Ministers' Deputies)*

The Committee of Ministers, under the terms of Article 15.b of the Statute of the Council of Europe,

Bearing in mind the Universal Declaration of Human Rights proclaimed by the General Assembly of the United Nations on 10 December 1948;

Bearing in mind the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights of 16 December 1966;

Bearing in mind the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950;

Bearing in mind the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine of 4 April 1997;

Considering that the aim of the Council of Europe is to achieve a greater unity between its members, in particular by promoting the adoption of common rules in legal matters;

Noting that demographic and medical changes have resulted in an increased number of people who, although of full age, are incapable of protecting their interests by reason of an impairment or insufficiency of their personal faculties;

Noting also that social changes have resulted in an increased need for adequate legislation to ensure the protection of such people;

Noting that legislative reforms on the protection, by representation or assistance, of incapable adults have been introduced or are under consideration in a number of member states and that these reforms have common features;

¹ When adopting this decision, the Representative of Ireland indicated that, in accordance with Article 10.2c of the Rules of Procedure for the meetings of the Ministers' Deputies, he reserved the right of his Government to comply or not with principles 5 and 6 of the Recommendation.

When adopting this decision, the Representative of France indicated that, in accordance with Article 10.2c of the Rules of Procedure for the meetings of the Ministers' Deputies, the following reservation should be made: France considers that the application of principle 23, para. 3 should be subject to a request by the person concerned.

Recognising, however, that wide disparities in the legislation of member states in this area still exist;

Convinced of the importance in this context of respect for human rights and for the dignity of each person as a human being,

Recommends the governments of member states to take or reinforce, in their legislation and practice, all measures they consider necessary with a view to the implementation of the following principles:

PRINCIPLES

Part I – Scope of application

1. The following principles apply to the protection of adults who, by reason of an impairment or insufficiency of their personal faculties, are incapable of making, in an autonomous way, decisions concerning any or all of their personal or economic affairs, or understanding, expressing or acting upon such decisions, and who consequently cannot protect their interests.
2. The incapacity may be due to a mental disability, a disease or a similar reason.
3. The principles apply to measures of protection or other legal arrangements enabling such adults to benefit from representation or assistance in relation to those affairs.
4. In these principles "adult" means a person who is treated as being of full age under the applicable law on capacity in civil matters.
5. In these principles "intervention in the health field" means any act performed professionally on a person for reasons of health. It includes, in particular, interventions for the purposes of preventive care, diagnosis, treatment, rehabilitation or research.

Part II – Governing principles

Principle 1 – Respect for human rights

In relation to the protection of incapable adults the fundamental principle, underlying all the other principles, is respect for the dignity of each person as a human being. The laws, procedures and practices relating to the protection of incapable adults shall be based on respect for their human rights and fundamental freedoms, taking into account any qualifications on those rights contained in the relevant international legal instruments.

Principle 2 – Flexibility in legal response

1. The measures of protection and other legal arrangements available for the protection of the personal and economic interests of incapable adults should be sufficient, in scope or flexibility, to enable a suitable legal response to be made to different degrees of incapacity and various situations.
2. Appropriate measures of protection or other legal arrangements should be available in cases of emergency.

3. The law should provide for simple and inexpensive measures of protection or other legal arrangements.
4. The range of measures of protection should include, in appropriate cases, those which do not restrict the legal capacity of the person concerned.
5. The range of measures of protection should include those which are limited to one specific act without requiring the appointment of a representative or a representative with continuing powers.
6. Consideration should be given to the inclusion of measures under which the appointed person acts jointly with the adult concerned, and of measures involving the appointment of more than one representative.
7. 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.
8. Consideration should be given to the need to provide expressly that certain decisions, particularly those of a minor or routine nature relating to health or personal welfare, may be taken for an incapable adult by those deriving their powers from the law rather than from a judicial or administrative measure.

Principle 3 – Maximum preservation of capacity

1. The legislative framework should, so far as possible, recognise that different degrees of incapacity may exist and that incapacity may vary from time to time. Accordingly, a measure of protection should not result automatically in a complete removal of legal capacity. However, a restriction of legal capacity should be possible where it is shown to be necessary for the protection of the person concerned.
2. In particular, a measure of protection should not automatically deprive the person concerned of the right to vote, or to make a will, or to consent or refuse consent to any intervention in the health field, or to make other decisions of a personal character at any time when his or her capacity permits him or her to do so.
3. Consideration should be given to legal arrangements whereby, even when representation in a particular area is necessary, the adult may be permitted, with the representative's consent, to undertake specific acts or acts in a specific area.
4. Whenever possible the adult should be enabled to enter into legally effective transactions of an everyday nature.

Principle 4 – Publicity

The disadvantage of automatically giving publicity to measures of protection or similar legal arrangements should be weighed in the balance against any protection which might be afforded to the adult concerned or to third parties.

Principle 5 – Necessity and subsidiarity

1. No measure of protection should be established for an incapable adult unless the measure is necessary, taking into account the individual circumstances and the needs of the person concerned. A measure of protection may be established, however, with the full and free consent of the person concerned.

2. In deciding whether a measure of protection is necessary, account should be taken of any less formal arrangements which might be made, and of any assistance which might be provided by family members or by others.

Principle 6 – Proportionality

1. Where a measure of protection is necessary it should be proportional to the degree of capacity of the person concerned and tailored to the individual circumstances and needs of the person concerned.
2. The measure of protection should interfere with the legal capacity, rights and freedoms of the person concerned to the minimum extent which is consistent with achieving the purpose of the intervention.

Principle 7 – Procedural fairness and efficiency

1. There should be fair and efficient procedures for the taking of measures for the protection of incapable adults.
2. There should be adequate procedural safeguards to protect the human rights of the persons concerned and to prevent possible abuses.

Principle 8 – Paramountcy of interests and welfare of the person concerned

1. In establishing or implementing a measure of protection for an incapable adult the interests and welfare of that person should be the paramount consideration.
2. This principle implies, in particular, that the choice of any person to represent or assist an incapable adult should be governed primarily by the suitability of that person to safeguard and promote the adult's interests and welfare.
3. This principle also implies that the property of the incapable adult should be managed and used for the benefit of the person concerned and to secure his or her welfare.

Principle 9 – Respect for wishes and feelings of the person concerned

1. In establishing or implementing a measure of protection for an incapable adult the past and present wishes and feelings of the adult should be ascertained so far as possible, and should be taken into account and given due respect.
2. This principle implies, in particular, that the wishes of the adult as to the choice of any person to represent or assist him or her should be taken into account and, as far as possible, given due respect.
3. It also implies that a person representing or assisting an incapable adult should give him or her adequate information, whenever this is possible and appropriate, in particular concerning any major decision affecting him or her, so that he or she may express a view.

Principle 10 – Consultation

In the establishment and implementation of a measure of protection there should be consultation, so far as reasonable and practicable, with those having a close interest in the welfare of the adult concerned, whether as representative, close family member or otherwise. It is for national law to determine which persons should be consulted and the effects of consultation or its absence.

Part III – Procedural principles

Principle 11 – Institution of proceedings

1. The list of those entitled to institute proceedings for the taking of measures for the protection of incapable adults should be sufficiently wide to ensure that measures of protection can be considered in all cases where they are necessary. It may, in particular, be necessary to provide for proceedings to be initiated by a public official or body, or by the court or other competent authority on its own motion.
2. The person concerned should be informed promptly in a language, or by other means, which he or she understands of the institution of proceedings which could affect his or her legal capacity, the exercise of his or her rights or his or her interests unless such information would be manifestly without meaning to the person concerned or would present a severe danger to the health of the person concerned.

Principle 12 – Investigation and assessment

1. There should be adequate procedures for the investigation and assessment of the adult's personal faculties.
2. No measure of protection which restricts the legal capacity of an incapable adult should be taken unless the person taking the measure has seen the adult or is personally satisfied as to the adult's condition and an up-to-date report from at least one suitably qualified expert has been submitted. The report should be in writing or recorded in writing.

Principle 13 – Right to be heard in person

The person concerned should have the right to be heard in person in any proceedings which could affect his or her legal capacity.

Principle 14 – Duration, review and appeal

1. Measures of protection should, whenever possible and appropriate, be of limited duration. Consideration should be given to the institution of periodical reviews.
2. Measures of protection should be reviewed on a change of circumstances and, in particular, on a change in the adult's condition. They should be terminated if the conditions for them are no longer fulfilled.
3. There should be adequate rights of appeal.

Principle 15 – Provisional measures in case of emergency

If a provisional measure is needed in a case of emergency, principles 11 to 14 should be applicable as far as possible according to the circumstances.

Principle 16 – Adequate control

There should be adequate control of the operation of measures of protection and of the acts and decisions of representatives.

Principle 17 – Qualified persons

1. Steps should be taken with a view to providing an adequate number of suitably qualified persons for the representation and assistance of incapable adults.
2. Consideration should be given, in particular, to the establishment or support of associations or other bodies with the function of providing and training such people.

Part IV – The role of representatives

Principle 18 – Control of powers arising by operation of law

1. Consideration should be given to the need to ensure that any powers conferred on any person by operation of law, without the intervention of a judicial or administrative authority, to act or take decisions on behalf of an incapable adult are limited and their exercise controlled.
2. The conferment of any such powers should not deprive the adult of legal capacity.
3. Any such powers should be capable of being modified or terminated at any time by a measure of protection taken by a judicial or administrative authority.
4. Principles 8 to 10 apply to the exercise of such powers as they apply to the implementation of measures of protection.

Principle 19 – Limitation of powers of representatives

1. It is for national law to determine which juridical acts are of such a highly personal nature that they can not be done by a representative.
2. It is also for national law to determine whether decisions by a representative on certain serious matters should require the specific approval of a court or other body.

Principle 20 – Liability

1. Representatives should be liable, in accordance with national law, for any loss or damage caused by them to incapable adults while exercising their functions.
2. In particular, the laws on liability for wrongful acts, negligence or maltreatment should apply to representatives and others involved in the affairs of incapable adults.

Principle 21 – Remuneration and expenses

1. National law should address the questions of the remuneration and the reimbursement of expenses of those appointed to represent or assist incapable adults.

2. Distinctions may be made between those acting in a professional capacity and those acting in other capacities, and between the management of personal matters of the incapable adult and the management of his or her economic matters.

Part V – Interventions in the health field

Principle 22 – Consent

1. Where an adult, even if subject to a measure of protection, is in fact capable of giving free and informed consent to a given intervention in the health field, the intervention may only be carried out with his or her consent. The consent should be solicited by the person empowered to intervene.

2. Where an adult is not in fact capable of giving free and informed consent to a given intervention, the intervention may, nonetheless, be carried out provided that:

– it is for his or her direct benefit, and

authorisation has been given by his or her representative or by an authority or a person or body provided for by law.

3. Consideration should be given to the designation by the law of appropriate authorities, persons or bodies for the purpose of authorising interventions of different types, when adults who are incapable of giving free and informed consent do not have a representative with appropriate powers. Consideration should also be given to the need to provide for the authorisation of a court or other competent body in the case of certain serious types of intervention.

4. Consideration should be given to the establishment of mechanisms for the resolution of any conflicts between persons or bodies authorised to consent or refuse consent to interventions in the health field in relation to adults who are incapable of giving consent.

Principle 23 – Consent (alternative rules)

If the government of a member state does not apply the rules contained in paragraphs 1 and 2 of Principle 22, the following rules should be applicable:

Where an adult is subject to a measure of protection under which a given intervention in the health field can be carried out only with the authorisation of a body or a person provided for by law, the consent of the adult should nonetheless be sought if he or she has the capacity to give it.

2. Where, according to the law, an adult is not in a position to give free and informed consent to an intervention in the health field, the intervention may nonetheless be carried out if:

– it is for his or her direct benefit, and

– authorisation has been given by his or her representative or by an authority or a person or body provided for by law.

3. The law should provide for remedies allowing the person concerned to be heard by an independent official body before any important medical intervention is carried out.

Principle 24 – Exceptional cases

1. Special rules may be provided by national law, in accordance with relevant international instruments, in relation to interventions which, because of their special nature, require the provision of additional protection for the person concerned.
2. Such rules may involve a limited derogation from the criterion of direct benefit provided that the additional protection is such as to minimise the possibility of any abuse or irregularity.

Principle 25 – Protection of adults with a mental disorder

Subject to protective conditions prescribed by law, including supervisory, control and appeal procedures, an adult who has a mental disorder of a serious nature may be subjected, without his or her consent, to an intervention aimed at treating his or her mental disorder only where, without such treatment, serious harm is likely to result to his or her health.

*Principle 26 – Permissibility of intervention
in emergency situation*

When, because of an emergency situation, the appropriate consent or authorisation cannot be obtained, any medically necessary intervention may be carried out immediately for the benefit of the health of the person concerned.

*Principle 27 – Applicability of certain principles
applying to measures of protection*

1. Principles 8 to 10 apply to any intervention in the health field concerning an incapable adult as they apply to measures of protection.
2. In particular, and in accordance with principle 9, the previously expressed wishes relating to a medical intervention by a patient who is not, at the time of the intervention, in a state to express his or her wishes should be taken into account.

Principle 28 – Permissibility of special rules on certain matters

Special rules may be provided by national law, in accordance with relevant international instruments, in relation to interventions which are necessary in a democratic society in the interest of public safety, for the prevention of crime, for the protection of public health or for the protection of the rights and freedom of others.