

Introducing a Capacity & Self-Determination Law for Jersey

Why a new law?

Capacity issues potentially affect everyone. A person's capacity to make some decisions may be impaired for a variety of reasons, such as learning difficulties; mental health problems; suffering a stroke; head injuries; dementia; or substance misuse.

Although there are various States of Jersey policies and aspects of existing Jersey law that are relevant in this context, currently Jersey does not have specific legislation to protect someone whose decision making has become impaired.

Therefore a new Law, the Capacity & Self-Determination Law, has been drafted to safeguard the dignity and wellbeing of people who may not have the capacity to make decisions for themselves. The new Law has been developed with regard both to modern standards in clinical practice and to legislation and case law in Jersey and England. In addition, the new Law has been developed alongside the new Mental Health Law.

What areas will the new Law cover?

The new Law would apply to *any* decision affecting a person who may not have capacity. So the new Law may apply to decisions about how a person will be cared for and the medical treatment they will receive. It will also apply to the day-to-day decisions about how people live their lives and manage their finances.

The new Law will provide a legal framework for assessing whether a person has capacity to make a particular decision and, where they lack capacity, a process to ensure that any decision made for the person is made by appropriate individuals and in the person's best interests.

The new Law will have a focus on supporting decision-making by the person affected, enabling them to make advance decisions about their future care or treatment in the event that they may lose capacity and to appoint people to make decisions on their behalf with regard to health, welfare and financial matters.

How will this affect people's Human Rights?

The Capacity & Self-Determination law will look to establish appropriate safeguards for people who lack capacity, so that they are only deprived of their liberty when that is necessary and in their own best interests. The Law will ensure that individuals can be detained only when it has been properly authorised. There will also be the opportunity to challenge this authorisation.

Human rights principles are particularly relevant in this area and there have been a number of important judgments delivered by the European Court of Human Rights and the Supreme Court in England on the subject, which the new Law reflects.

The new Law will provide protection, not only for individuals who may lack capacity, but also legal protection for those who may need to make decisions in the best interests of the individual.

Awareness and understanding of the new Law among service users, service providers and professionals, in all walks of life, will be vital.

What are the key elements of the new Law?

a. Guiding principles

The new Law will provide a simple collection of principles that will underlie the provisions in the new Law. These principles, which for example state that a person must be assumed to have capacity unless it is established that they lack capacity, are intended to guide those who use the new Law to empower people to make decisions for themselves whenever possible.

b. Test for assessing capacity

Tests within the new Law are based on the principles of the UK's Mental Capacity Act 2005 and are aimed at achieving better and more consistent decision making. The new Law will provide that someone's capacity to make a decision for themselves should be assessed using the two-stage test of capacity:

1. Does someone have an impairment of the mind or brain, or is there some disturbance in the way their mind or brain works?
2. Does that impairment or disturbance mean that the person is unable to make a particular decision at the time it needs to be made?

If the answer to both questions is yes, then the person will not have capacity to make the particular decision at the particular time. Otherwise, they should be presumed to have capacity to make the decision. So, for example, a person may have capacity to make a particular decision on a particular day about an aspect of his care and welfare, but may not have capacity to make a decision on that day about an aspect of his financial affairs.

A person will be considered to lack the capacity to make a decision if he/she is unable to -

1. understand the information relevant to the decision,
2. retain that information,
3. use or weigh that information as part of the process of making the decision, or
4. communicate his/her decision (whether by talking, using sign language or any other means).

One of the principles underpinning the new Law, as mentioned above, is that a person is not to be treated as unable to make a decision merely because he/she makes an unwise decision.

c. Best interests

If an individual is assessed not to have capacity, under the new Law a decision can be made in their best interests with regard to the following -

- whether it is likely that the person will at some time have capacity in relation to the matter in question, and, if it appears likely that he/she will, when that is likely to be.
- the person's past and present wishes and feelings, which may include any relevant written statements made before he/she lost capacity;
- the beliefs and values that would be likely to influence his or her decision; and
- other factors that he or she would be likely to consider if he/she were able to do so.

Where possible, the decision-maker should take into account the views of the individual as well as -

- anyone named by the individual;
- anyone engaged in caring for the individual or interested in their welfare;
- anyone appointed pursuant to a lasting power of attorney made under the new Law;
- anyone appointed by the Royal Court to handle their affairs.

d. Lasting powers of attorney (LPA)

The new Law will include provision for LPAs which will need to conform to certain requirements and be registered by the Judicial Greffe in order to have legal effect. Presently, a person cannot make a lasting power of attorney (or 'enduring powers of attorney' as they are otherwise known) if that person lives in Jersey. The proposed LPA provisions in the new Law will open up this facility to Jersey residents.

A person will be able to appoint another person(s) to make decisions on their behalf if they lose capacity. There will be two types of LPA, which can be performed either both by the same person or by different people acting alone or jointly, relating to:

- a. health and welfare – this would include making decisions about things like their daily routine (e.g. eating and what to wear), medical care, moving into a care home and life-sustaining treatment
- b. property and affairs – this would include making decisions about money and property, such as paying bills, collecting benefits and selling assets such as the person's home

e. Advanced decision to refuse treatment – (ADRT)

The new Law will enable a person to make a decision to refuse treatment if they should lose capacity to give (or refuse) consent in the future. Where an ADRT concerns treatment that is necessary to sustain life, strict formalities must be complied with in order for the advance decision to be applicable. Currently, although there is legal precedent for advance decisions of this nature, Jersey lacks a clear and accessible legal framework for their use.

The effect of a valid ADRT should be the same as a decision that is made by a person with capacity to refuse treatment, so medical professionals will be required to act in accordance with it.

f. Powers for the Royal Court to make decisions and appoint delegates

There will be situations in which a person loses capacity to make a decision for themselves and has not appointed an attorney to make a decision for them, whether about their care and treatment or property and affairs.

In such instances, the new Law will give express powers to the Royal Court to make decisions on behalf of an individual who lacks capacity and the power to appoint someone as "a delegate" – which is similar to an LPA, but rather than giving lasting powers, the appointment of a delegate is limited in terms of the scope of the decisions they can make and the length of time they can do it for, as ordered by the Court.

g. Clarifying when restraint can be used

Under the new Law restraint is defined as the use or threat of force where a person who lacks capacity resists or objects, and any restriction of liberty or movement whether or not the person resists. So it may include a situation either where a carer physically restrains a person from doing something or tells them that they will do so if they try.

Acts of restraint are not permitted except in specific circumstances described in the Law, for example in order to prevent harm to the person being restrained.

h. Capacity and Liberty (CAL) assessments and authorisations

The new Law will set out a framework for making CAL assessments which will involve a registered care professional assessing whether a person has the capacity to consent to proposals made for their treatment and, if not, whether it is necessary for those arrangements to involve a significant

restriction on their liberty (i.e. measures applying to a person on a regular basis such as limiting a person's access to a place or controlling or limiting a person's contact with others). This would likely be performed alongside assessments of long term care needs or the creation of care plans.

Where CAL assessments confirm that a significant restriction on liberty is necessary the Minister for Health and Social Services could authorise it. An authorisation would allow a care provider to impose one or more significant restrictions on someone's liberty for a limited period of time, in general this would be for a maximum of 12 months with the option to renew the authorisation for a further period of 12 months. In the absence of a CAL authorisation, significant restrictions on liberty may only be imposed for the period during which a CAL assessment is being carried out under authorisation by the Minister. Alternatively, a restriction can be imposed by the Court or to facilitate the provision of life sustaining treatment.

The system for challenging a CAL authorisation would be similar to that for challenging compulsory detention under the new Mental Health Law through the Mental Health Review Tribunal.

i. Wilful neglect and ill-treatment

There have been a number of cases in the UK and also in Jersey where the neglect and abuse of vulnerable persons has caused them harm. The Law will create a new offence to cover wilful neglect and abuse that applies to the treatment of people in care homes, or provided with domiciliary care or supported living arrangements.

j. Codes of Practice

The new Law will enable the Minister to publish a code of practice to accompany the new Law, providing guidance to all those working with and/or caring for a person who lacks capacity, including family members, professionals and carers. Codes may, in particular, provide guidance about the circumstances that may amount to a deprivation of liberty.