# Capacity and Self-Determination (Jersey) Law 201-

# Response to stakeholder consultation

## Section 1: Introduction

1 Capacity issues potentially affect everyone. A person's capacity to make some decisions may be impaired for a variety of reasons. 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.

2 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.

3 The Project Team, composed of officials in the Health and Social Services Department, Law Officers' Department, Law Draftsman's Office and Chief Minister's Department have collaborated to support the conduct of the consultation processes that have been undertaken. A number of channels of communication have been used, but particular use has been made of facilitated discussion groups, public meetings and on-line resources. The Minister for Health and Social Services and the Project Team are extremely grateful for the commitment that consultees have shown to this process.

4 In essence, the process of developing the draft Law lodged before the States Assembly consisted of five phases:

(a) The Project Team developed a statement of the key elements of the policy to be reflected in the draft Law;

(b) A targeted 'expert dialogue' then took place on the policy with key stakeholders who would be affected by the draft Law;

(c) The policy and instructions to the Law Draftsman were then developed taking account of the feedback in the expert dialogue and the draft Law was prepared by the Law Draftsman;

(d) A public were then given an opportunity to comment on the draft Law in an open public consultation; and

(e) The feedback from the public consultation was then considered by the Project Team and the draft Law was revised;

5 The focus of this document is on presenting the outcomes of the expert dialogue and public consultation phases of the development of the draft Law. The comments of individual stakeholders and members of the public have not been attributed to them.

## Section 2: Expert Dialogue

6 On the 16th October 2014 an expert dialogue day was held at Jersey Hospice. There were 45 attendees representing:

- Carer and Service Users
- Voluntary and community sector
- Safeguarding Partnership Board
- H&SSD
- Primary Care
- The Magistrates Court
- Judicial Greffe
- Mental Health review tribunal
- Viscounts Department
- Law Society

7 Prior to the expert dialogue day those attending were forwarded two documents, "Proposed Capacity Law Background Reading" and "Proposed Capacity Law Expert Dialogue – Workbook". The attendees were given the opportunity to use the workbook prior to and during the workshop as a means to respond to the broad policy proposition. The completed responses helped shape the final law draft which was published for full consultation in September 2015.

8 At the expert dialogue day workshop participants were divided into 6 groups each with a facilitator. The workshop consisted of three sessions, each of which was preceded with a short presentation focussing on different parts of the proposed new legislation which were; '*Making Decisions', 'Planning for the Future' and 'Placing restrictions on People Who Lack Capacity'*. Each of the three topics was discussed in detail within the groups followed by feedback to the larger group. The key feedback issues were captured by a note taker and notes of the workshop including the feedback was circulated to the attendees.

9 The broad issues raised at the workshop and from the returned workbook responses are highlighted below:

***Topic 1: Making Decisions***

10 It was agreed that as in the UK it would be the person responsible for the procedure (i.e. surgeon/lawyer/financial adviser) who would make the best interest decision. They should have a duty to consult with all "involved" but it would be a single decision (i.e. decision rests with decision-maker). All in attendance felt that tailored training would be required for decision makers working in different sectors.

11 There was discussion regarding exclusions for best interest decisions such as marriage, divorce, and voting, and sexual relationships. The principle that some decisions should not be made on a person's behalf was accepted but it was acknowledged that difficult issues may arise, particular in relation to sexual relationships between married couples where one half of the couple develops dementia. There was some concern about the application of the criminal law in those circumstances where a person becomes incapable of consenting to sexual activity.

12 It was suggested that flexible provision should be made to allow a variety of persons to make capacity assessments, but that the Code of Practice should provide more specific guidance on particular situations.

13 There was discussion regarding best interest decision for young people aged 16 to 18. It was suggested parents are not always best to make decisions under parental responsibility. The new law should offer clarity about capacity and best interest decisions for 16 to 18 year olds.

***Topic 2: Planning for the Future***

14 There was a presentation regarding the making of lasting powers of attorney, Court Appointed Attorney's and service User Advocacy.

15 A question was raised regarding the appointment of a Lasting Power of Attorney (LPA) for someone who is non-resident in Jersey, e.g. a son in England. It was felt this should be possible. There was a consensus that it shouldn't be necessary to seek an opinion from a doctor confirming capacity before an LPA could be made.

16 There was discussion regarding the transfer from Curatorship to LPA. Some of the attendees felt there should be a transition period between existing and proposed law.

17 There was discussion regarding the costs of registering LPAs. It was suggested there should be a ceiling price to ensure as many people as possible complete LPAs at a time that they have capacity, it was stated that in some ways an LPA is more important than a Will because the person is still alive whilst decisions are being made for them.

18 There was a suggestion that we should stay with the familiar name of 'Curator' rather than Court appointed Attorney. An alternative view was that the term 'curator' should not be used in the new legislation as the current role and future role are quite different.

19 There was discussion regarding the role of the Viscount and Judicial Greffe and the core function of maintaining a central register for LPAs

***Topic 3: Placing Restrictions on People who lack Capacity***

20 There was significant discussion regarding the issue of training and it was stated that new Law should require that people authorised to restrain persons should demonstrate their competency.

21 These particular reforms should also be taken as an opportunity for family and carers to be aware of what the law regarding restraint is.

22 People were asked their views on the proposal to provide Capacity and Liberty Assessments which was felt to be a good idea with a clear desire to avoid the bureaucratic processes involved in the UK for DoLs.

23 It was agreed that a CAL assessments should be authorised, but that role didn't necessarily need to be performed by a Doctor or Psychiatrist.

24 There was clear agreement that there must be a right to appeal to the Tribunal rather than the Royal Court in respect of a CAL authorisation.

25 It was suggested that it should be a requirement for registered Care Home Managers to seek CALs for all relevant people within their care.

26 There was a suggestion that an approved list of assessors might be created (akin to Duly Authorised Officers under the new Mental Health Law).

## Section 3: Law drafting

27 Following the expert dialogue process and being cognisant of the comments and feedback received the Project Team prepared law drafting instructions. A law draftsman subsequently joined the Project Team and prepared a version of the draft Law for publication and public consultation.

28 During the law drafting phase of the project the Project Team sought input from a political steering group, which consisted of the Health and Social Services Minister, Treasury and Resources Minister, Housing Minister, Home Affairs Minister, External Relations Minister and the Assistant Chief Minister. The Project Team also met with the Health and Social Security Scrutiny Panel to give them an overview of the proposed draft Law and to enable them to discuss the broad issues and prepare for the detailed scrutiny process that will follow lodging of the draft Law.

## Section 4: Public Consultation on the Draft Law.

29 The draft law was published on the States of Jersey government consultation website on the 25th September 2015. A news release was circulated asking Islanders for their views on the draft Law. The consultation process ran until the 13th of November 2015, however, there were some late respondents whose comments have also been taken into account.

30 A supporting document was published alongside the draft Law giving an overview of why a draft law is required, the areas it intends to cover, how it will affect people's human rights,

and the key elements of the new law. This document was written in non-legal / non-medical language.

31 On the 12th October 2015 the expert dialogue group were invited to attend a presentation at St Helier Town Hall. The presentation gave an overview of the draft Law, with a focus on the provisions concerning planning for the future.

32 To ensure everyone affected by the replacement of the provisions for curatorship was aware of the consultation, the Judicial Greffe wrote to all existing curators to bring the draft Law to their attention.

33 There were also 3 public meetings held at St Helier Town Hall on the 12th, 19th and 21st October. Each of these public meetings consisted of an opening address from either the Minister of Health and Social Services or one of his assistant Ministers, a presentation from the policy lead and law officers and a question and answer session.

34 At the end of the consultation process a total of 19 written responses had been received from charitable and voluntary organisations, States of Jersey departments', law firms and individual members of the public. The quality of feedback was excellent and has been most valuable in shaping the final law that will be lodged before the States.

35 Of note was a detailed response from MIND Jersey that covered 114 comments. To ensure the issues they had raised were appropriately addressed, members of the Project Team met with MIND Jersey representatives to discuss the issues raised and address MINDs questions.

36 Below the key comments and issues received are recorded under their respective headings within the new law followed by a policy and legal response.

## General responses to the Capacity and Self-Determination Law

37 Respondents came from a range of backgrounds, including the voluntary sector, In particular Mind and Mencap, from public services and the non-ministerial departments. A number of responses also came from the legal profession and interested members of the

public. The consultation responses in respect of the draft Law were in many respects supportive of its aims and objectives.

38 The Jersey Consumer Council welcomed the proposed enactment of the draft Law, provided appropriate safeguards are adopted. Compassion in Dying (a UK Charity providing advice and support to people who wish to plan ahead for their future treatment and care, particularly at the end of life) welcomed the introduction of the new Capacity Law, but stressed the importance of appropriate awareness raising for the public and training to support the effective conduct of best interests decisions to ensure they are not dominated by clinical interests. They also highlighted the need for a formal system for recording and sharing advance decisions, to those professionals will have them at the relevant time.

39 Jersey citizen's advice bureau also positively welcomed the draft Law, as did many service providers and professionals working with vulnerable people.

40 A number of people asked for general reassurance about the safeguards in place and whether they are sufficient to protect vulnerable people from inappropriate actions of family members, attorneys and delegates acting under the new Law. In particular, one consultee would like to see a bar on the disposal of personal property for a specific period of time.

41 Another concern was that families and individuals might be left unsupported where a person whose capacity fluctuates and makes very poor decisions during bouts of mental ill health is viewed as having capacity. It was highlighted by a number of respondents that clear guidance would be required by everyone working with a person who may lack capacity about making the decisions and how the best interests' process should be properly carried out.

***Response:*** The Law will provide citizens the ability to determine who should make decisions for them in the event they lose capacity by making a lasting power of attorney. Making such a power will provide a person with the ability to plan for a time when they may lose capacity and inform those who might make decision for them about their wishes with respect to the person's property and affairs.

Further, Article 3 of the draft Capacity Law requires that a person acting under a power of attorney or as a delegate appointed by the court must make decisions in the person's best interests. What is in a person's best interests should be determined from the perspective of the person themselves pursuant to Article 6 of the draft Capacity Law. We think further guidance can be provided in the Code of Practice on the operation of the new Capacity Law prepared pursuant to Article 72 with regard to these matters.

*42* The States Veterinary Officer raises issue about making appropriate provision for the pets of people who lose capacity. In particular, the States Vet is concerned that in some instances a person might lose capacity, the animals be taken to place of safe custody and it might at that point become clear that they have been neglected while in their owners care. However, while it might be possible to prosecute the owner in respect of this neglect in some cases, in others the owner might be unfit to plead or it might not be in the public interest to proceed with the prosecution. If the person is not convicted of an offence under the Animal Welfare (Jersey) Law 2004, then there does not appear to be a power in Article 30 or 31 of that Law to continue to protect the animal, even if by returning it to its owner it might be neglected. The owner also cannot be disqualified from owning additional pets

*43* The States Vet raises an important point and what might appear to be a lacuna in the Animal Welfare (Jersey) Law 2004. If the owner of a pet loses capacity it might well be thought inappropriate to proceed with a prosecution on public interest grounds and the owners might not be fit to plead to the accusation, which means that they couldn't be convicted of the offence. If there is no conviction then the court does not acquire the powers it needs in order to pet be confiscated. We should seek a consequential amendment to address this.

## Comments on Part 1 of the draft Law

### Inability to make a decision.

44 It was noted at Article 5 (1) (d) it refers to '*inability to communicate'* the decision as one of the factors that would lead a person to conclude that the person does not have capacity to

make their own decision. However should a partial inability be treated in this way or should only a *total inability to* communicate (e.g. locked in syndrome) be covered.

**Response:** The test proposed is the same as that in the Mental Capacity Act 2005 and we think that is desirable as it allows us to draw on relevant English case law, which while not binding, may inform our thinking on these issues. It is already clear from the principle in Article 3(1) (b) that all practical steps must have been taken to enable the person to make a decision before they are found incapable. Having taken such measures it will need to be assessed whether the person can or can't communicate a decision. The addition of a reference to a "*total inability*" might leave some people in limbo, since if in some sense they are partially unable to make a decision (unable to communicate a particular aspect of it), even with all practical and appropriate measures in place, it would not be clear whether the powers to make decisions for them can be used.

**Best Interests.**

45 We would like to see Article 6 (1) (b) include the words "permitted, encouraged and **supported** to participate" as someone who has difficulty in communicating or is cognitively impaired may well need support to do so.

**Response:** We recognise that it is important to support people without capacity to participate in decision making and actions taken on their behalf as fully as practicable. We've made this amendment

**Excluded decisions.**

46 We note understandably that Article 7 (1) (e) (ii) it excludes **sexual relations**. We appreciate that this is a difficult and sensitive area and it is hardly surprising that capacity legislation would exclude best interest decision making from a person's choice in relation to their sexual relations.

47 However, in the UK there is now a considerable difficulty as a result of the case of *IM v LM and AB and Liverpool City Council [2014] EWCA Civ 37* in which Lord Justice Leveson in the Court of Appeal in the UK at paragraph 1 of the judgement stated:

> "*the significance of this decision should not be underestimated: if, in any case there is a declaration of lack of capacity, the relevant local authority must undertake the very closest supervision of that individual to ensure, to such extent as is possible, that the opportunity for sexual relations is removed*".

48 This is nothing to do with abuse or exploitation. It does, however, mean that a couple who have been in a relationship for perhaps decades, if one loses the capacity to consent to sexual relations, at that point it becomes unlawful. It may be through the proposed Capacity and Self Determination (Jersey) law that this is something that Jersey as a society might want to reflect upon. The choice of the description of the title to the new law clearly gives the potential for an expanded remit.

**Response:** The comment raises a very important point; we must continue to bear in mind the need to ensure appropriate safeguarding for vulnerable adults but try to guard against inappropriately intruding into intimate details of people's private lives. The other factor driving the English courts comments is that English sexual offences legislation makes it an offence to have sexual relations with an adult with a mental disorder impeding their ability to give consent to sexual relations. We propose to create a similar offence in the Mental Health Law at present.

**Certain acts of restraint etc, which are not permitted.**

49 This provision refers to restraint ‘*not being a permitted act unless*’. This can be confusing, the law should state this as a positive obligation not to use restraint that is not proportionate to the likelihood of P suffering harm and the seriousness of that harm.

**Response:** We recognise that the legislative language is not the easiest to understand, but there is a good reason why the legislation is expressed in this way. The purpose of Article 8 of the Law is to provide re-assurance to professionals that where they have properly assessed a person and found them to lack capacity, and if they reasonably believe the action is in the persons bests interests then they incur no liability in respect of the matter, except as may arise from negligence. The purpose of Article 9 in this light is just to make it clear that Article 8 does not absolve a carer of liability for injury to the person arising from the use of restraint solely because they believe the restraint is in the person’s best interests, rather they must also be satisfied that the restraint is a necessary and proportionate response to the risk of harm.

**Payments by and on behalf of person lacking capacity.**

50 Does this create an ability for a carer to access a person’s bank account, savings etc.

**Response:** The provision is limited to a carer’s use of money in the P’s possession, being otherwise indemnified by P or pledging P’s credit for the purposes of an act in connection with care or treatment. These limits of themselves make it clear that the provision does not infer any wider authority to access bank accounts or make decisions on P’s behalf in relation to finance and affairs matters.

## Part two - Lasting Powers of Attorney.

51 On a general point, MIND were not clear as to whether a validly drawn and registered Lasting Powers of Attorney that is registered in the UK is recognised in Jersey. Because of the close nature of the jurisdictions MIND considered that this would be helpful.

**Response:** Article 13 of the draft Law provides that where a power of attorney is registered a jurisdiction of the British Islands outside Jersey it may have effect in Jersey if evidence (which will be prescribed by Regulations) as to the original registration is provided to the Judicial Greffe.

52 A practitioner at a local law firm, specialising in wills estates and probate, and who acted as a curator, raised a number of queries and comments –

a. What forms would be used for the grant of powers of attorney and what is the time limit for determining applications,

b. Is there a conflict between Articles 24(3) and Article 36(1) granting general powers,

c. There is an issue around the range of different terms to describe people who are assisting a person under both the Mental Health Law and Capacity Law. There might be a blurring of responsibilities among different people, particularly representatives and advocates / delegates and attorneys.

d. A cut-off date and immediate transition of existing cases to the new system was the simplest and best way of proceeding (i.e. from April 2018 existing curators would become delegates).

e. It is vital that training is provided in advance of the transition and that curators are supported with appropriate guidance to aid the transition. They would also need to have limits placed on their powers as a transitional measure to ensure that unscrupulous delegates were not able to substantially deplete their clients funds in an inappropriate way.

**Response:** These comments about clarifying the relationship between Articles 24 and 36 and with regard to how different roles are labelled and intend to make amendments accordingly were accepted. Several of the points made by the consultee re-enforced the case for changes to the draft Law which were taken on board following comments made by other respondents.

**Lasting Powers of Attorney, nature and definition.**

53 It was noted that a property and affairs LPA may include provision permitting the exercise of powers under the LPA where P does not lack capacity.

54 This means that a Lasting Power of Attorney can be created by a person who has capacity and it could take immediate effect while the person retains capacity. Whilst the sense in this was understood, there was a concern that this is may cause confusion. When the term LPA is used, it is often understood to mean that somebody is acting as an attorney following somebody's specific lack of capacity to make those particular decisions at that moment in time. Whilst it was understood why this provision has been added, it was considered a great deal clearer if in effect a person was required to create two documents. If a person with capacity wants to create an *attorneyship* whilst they still have capacity then there are free to do so. However, calling it an LPA might lead to confusion.

**Response:** It was not felt necessary to amend the terminology. The position is the same under the MCA and there are no reported issues with it causing any difficulty or confusion in practice in the UK.

**Scope of LPA limited power of restraint.**

55 There was a lack of understanding as to why this Article was required. There was a feeling that it merely duplicates Article 9 and it gives the mistaken impression that an attorney has a power to restrain by virtue of being an attorney. It was also not understood why simply because somebody has a financial lasting Power of Attorney that they should have a power of restraint. It was felt that the power of restraint should rest with the decision maker because they are responsible for that particular decision whatever it may be and the existence of an LPA is completely irrelevant.

**Response:** Article 14 of the draft Law was removed further to these comments. It was agreed that the provisions in Articles 8 and 9 would be sufficient where the circumstances were appropriate.

**Revocation etc. of LPA.**

**56** It needs to be made very clear that if a person with capacity wishes either to revoke or indeed change (which would have the effect of revocation) their LPA, the responsibility very much lies with *them* to ensure that the relevant people are aware of the revocation. These are very powerful legal instruments and as people's relationships change or views about treatments change it is vital that they are regularly reviewed.

57 **Response:** There was agreement with this comment. This would be a matter that would be covered in guidance to be issued to those granting an LPA and drawn specifically to the person's attention. Provision is made in Art 17 and paragraph 8 of Schedule 1 for registration of an LPA to be revoked by the person conferring it.

58 There was also a question as to whether an LPA made in Jersey would be applicable anywhere else.

**Response:** For a normal notarised Power of Attorney to be used abroad it must be verified (i.e. legalised). The legal term for the legalisation certificate is an 'Apostille', and such a

certificate confirms that a signature, seal or stamp appearing on a document belongs to a recognised Notary. Apostille legalisation is accepted in countries that have signed the 1961 Hague Convention. In the UK the Apostille is prepared by the Foreign & Commonwealth Office (FCO). It is understood that Jersey, Guernsey and Isle of Man issue their own legalisation certificates. The FCO checks the signature, seal or stamp that appears on the document against their database and then attach an Apostille (Legalisation / Certification) which confirms it is genuine to be acceptable.

59 The Registrar of the Probate Section of the Judicial Greffe made a number of comments about the proposed operation of the draft Law. There were some suggestions about what a fee structure might look like for the appointment of an LPA. It was also noted that any application fee must reflect that lay applicants might well require additional advice and support from the Judicial Greffe in order to complete their applications. It was noted further that notice of application for registration of an LPA will only be sent to the person and their potential attorney, not to other persons. It was queried then how details will become known to other family members and interested persons etc. A further point raised was the apparent contradiction between Article 24(3) and 36(1) and a concern over excessive referrals back to the Court for approval. A final point raised was around safeguards and ensuring that there is an appropriate mechanism for reviewing accounts. It was proposed that a new team could be created within the Judicial Greffe to carry out this regulatory role.

**Response:** A number of the points raised by the Probate Section of the Judicial Greffe are primarily implementation issues that we need to consider further going forward over the period to 2018. However, in light of these comments, an amendment was made to Article 36 to expand its scope so that the power to make provision allows provision to be made about the monitoring and regulation of attorneys as well as delegates.

Article 36 was also amended so that the States could by Regulations (rather than the Minister by Order) designate a person or office as having responsibility for the supervision of persons exercising LPA or delegate powers. This amendment meant that regulatory issues could be accumulated into one set of regulations rather than having a number of governing instruments.

## Part Three Advanced decisions to refuse treatment.

### Decisions to which this Part applies

60 It was noted that an LPA can be drawn by anyone who is 18 whereas an Advanced Decision to Refuse Treatment becomes available at 16. The reasons for this distinction were not considered to be clear.

**Response:** The intention in Article 21 was to adopt the same position as is adopted in section 9(2)(c) of the MCA 2005. There is a delicate balance to be struck here. There is a wish to recognise that people aged 16 and 17 should be able to make decisions for themselves, including with regard to specific medical treatment they do not wish to receive. However, where a 16 or 17 year old is unable to do so, it was considered right that by default decisions on matters that would not be addressed in an ADRT should be taken for the child by the person(s) with parental responsibility for the child. It is not appropriate for a child of 16 or 17 years of age to be able to displace his or her parents by making a PoA giving decision making responsibility to a third party.

61 It was suggested that Part 3 should make clearer provision concerning the relationship between an Advanced Decision to Refuse Treatment and someone being detained and forcibly treated under Part 5 of the new Mental Health Law. The consultee highlighted the

case of *Nottinghamshire Health Care NHS Trust the RC [2014] EWHC 1317 (COP).* This was a case of a young man who was a Jehovah Witness, who was detained under the Mental Health Act and he had made a valid an applicable advanced decision to refuse blood transfusions. When the matter came before Mostyn J he reviewed the relationship between a valid and applicable advanced decision and the UK Mental Health Act. Essentially decisions of this nature, where there is a valid and applicable Advance Decision, should be a judicial decision and when considering whether or not the Mental Health Act overrode his capacitous wishes the Judge stated:

> *"in my judgment it would be an abuse of power in such circumstances even to think about imposing a blood transfusion on RC having regard to my findings that he presently has capacity to refuse blood products and where such capacity disappear for any reason an advanced decision would be operative. To impose a blood transfusion would be a denial of a most basic freedom. I therefore declare that the decision of Dr S is lawful and that it would be lawful for those responsible for the medical care of RC to withhold all and any treatment which is transfusion into him of blood or primary blood components notwithstanding the existence of powers under Section 63 Mental Health Act".*

**Response:** A valid ADRT that is applicable to treatment for mental disorder should be capable of being overridden by the compulsory treatment powers in the MHL albeit that (as in the *Nottinghamshire Health Care NHS Trust* case mentioned above) the treating doctor will need to think very carefully before using those powers to treat a person in a manner that is contrary to an ADRT. The legal position is clear, if not spelled out expressly in the draft Laws. A patient can be treated without consent under Article 39 of the draft MHL, or with consent or a SOAD certificate pursuant to Article 41. Where a patient can be treated without consent, the absence of consent while a person has capacity and an ADRT

continuing to refuse consent to a certain type of treatment after the person loses capacity won't override the compulsory powers. If consent is not required then the effect of the ADRT in maintaining a refusal of consent after the person loses capacity does not prevent the treating doctor from using the compulsory treatment powers. There are good reasons why this is the right result from a policy perspective. An ADRT can be created very easily and if a person could give an ADRT refusing all relevant types of medical treatment for their mental disorder that overrides the compulsory powers in the Mental Health Law that could leave medical professionals in a position where they are unable to effectively treat a patient in desperate need of medical care. Looking at the Code of Practice to the Mental Health Act 1983 (https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/435512/MHA_Code_of_Practice.PDF p.75) it is noted that, in England and Wales, the view is that while it should be possible to override an ADRT, where possible the views expressed in an ADRT should be considered in reaching a best interest decision for the patient. That is the right approach and it is the approach reflected in the decision of the court in *Nottinghamshire Health Care NHS Trust* case.

## Part Four - Appointment of delegates and related powers of the Court.

**Applications in case of persons admitted to approved establishments.**

62 It is note that where somebody is under Guardianship and nobody has been appointed to make decisions as to Ps personal welfare or manage Ps property and affairs, the Minster shall report to the Attorney General who may apply to the Court for a Delegate to be appointed. There was confusion as to why this was required.

**Response:** The purpose of this provision is to help ensure that no-one who needs to have decisions made on their behalf falls through the net. The Minister is only obliged to report to the Attorney General where it appears that the person detained or subject to

guardianship does not have capacity to manage their property and affairs or make decisions as to their personal welfare. Further, the Attorney General is not obliged to make an application where he receives a report. However, the reporting process will ensure that where there is a need for decisions to be made the Attorney General will have it brought to his attention that an application is required. As should be appreciated, not everyone will have a person who can bring an application for them under Article 24, but where they do then the Attorney General will not need to make an application.

**Specific provision which may be made under this Part as to P's personal welfare.**

63 It was felt that these powers were rather more radical in nature than they looked. It was noted that the experience in the UK of the appointment of personal welfare deputies is set out in the UK Code of Practice to the Mental Capacity Act at paragraph 8.38. This guidance indicates the deputies for personal welfare decisions will only be required in the most difficult cases and then sets out a list. It was further emphasised in the case of *London Borough of Havering v LD and KD (2010)* that the practice of appointing a personal welfare deputy would only be exercised by the court very rarely. The rationale for this was that essentially in uncontested matters, the person who should be making the decision is the decision maker under mental capacity law. If there is a dispute about this, then this dispute itself should be resolved by the Court and indeed the powers of Article 27 could well lead to a significant number of cases coming before the law courts where personal welfare delegates believe one thing is in P's best interests but the people responsible for providing and or funding care may believe something else. If a matter needs to be litigated it should be on the central point of P's best interests rather than a dispute about who can make the decision.

**Response:** The introduction of these powers is something new and it is accepted that they will require careful monitoring and consideration. The powers and the limits on them are clear on their face and are modelled on similar provisions in the MCA 2005. It is recognised that the need for a health and welfare attorney might arise much less frequently than in respect of property and affairs, where the need for specific documentary evidence in order to carry out particular transactions will more readily require the appointment of a delegate.

**Powers of delegates**

64 Respondents commented favourably on Article 36(2) which it was felt made it absolutely clear that a delegate has no power to make any decision when P **has capacity** to make that decision at that time for themselves. Taking account of the need to establish clearly the relationship between mental health law and capacity law it was noted that at 35(3) certain powers of the delegate are excluded. A question was raised about a situation where a **guardian** is appointed under Mental Health Law? If there is a disagreement between a guardian and delegate how will this be resolved?

**Response:** A guardian's powers would not overlap with those of finance and affairs delegate, but could overlap with those of a health and welfare delegate. However, this is primarily an issue of practice and implementation rather than legal conflict. It will be rare that a health and welfare delegate is appointed by the Court after the guardian is appointed; and this would presumably only be necessary where it was considered that the guardian's powers were insufficient for the purposes of making relevant welfare decisions. Therefore the court, when appointing the delegate, would be able to identify and limit the powers of the delegate to prevent conflict. Likewise a guardian would not be appointed for a person who

has already had a delegate appointed to make decisions on health and welfare matters, but any potential overlap that could arise would be best considered in the particular circumstances rather than setting out a strict legal hierarchy in the new Laws.

65 The Viscount's Department, who are currently appointed under the Mental Health (Jersey) Law 1969 to act as curator of last resort for people who lose capacity to manage their financial affairs and for whom there is no-one willing to act as curator, made a number of comments with respect to this Part of the draft Law. The Viscount noted that under the new Capacity Law a delegate may be appointed to make decisions about a person's health and welfare as well as their property and affairs.

**Response:** The Viscount currently performs a valuable public service as the curator of last resort for interdicts who have no-one else to act for them. The provision in Part 4 of the draft Capacity Law enabling a delegate to be appointed to make decisions about health and welfare matters, property and affairs matters or both, is very similar to that in England and Wales in the Mental Capacity Act 2005 for the appointment of a 'deputy' of the Court of Protection. In that jurisdiction the option for the Court of Protection to appoint a health and welfare 'deputy' has rarely been used. This is because the Mental Capacity Act 2005, like the draft Law, affords powers for health and social care professionals to make health and welfare decisions on behalf of a patient who has lost capacity in that patient's best interests. Further provision is made both in the 2005 Act (again like the draft Law) so that a person can make a lasting power of attorney to appoint a person to make health and welfare decision for them. There are circumstances where there is no attorney, or none with authority to act and a serious decision needs to be made about a person's care or treatment (e.g. in relation to the withdrawal of medical treatment or where there is a dispute about where or with whom a person should live). However, in those cases an application can be made to the Court for it to make the decision in the person's best interests. The appointment of a

Deputy under the 2005 Act to make personal welfare decisions is therefore only required in the most difficult cases where important and necessary actions cannot be carried out without the court's authority in the best interests of the person, but where a series of linked welfare decisions need to be made over time so that it would not be beneficial or appropriate to require all of those decisions to be made by the court. For example, where someone (such as a family carer) who is close to a person with profound and multiple learning disabilities might apply to be appointed as a deputy with authority to make such decisions.

Just as in England and Wales, it is expected that the circumstances where a health and welfare delegate would need to be appointed would be rare and that the expertise required of the person to be appointed would vary. As a result, it is not considered necessary or appropriate to try to plan for the delivery of such a service by a particular public body at this time. Further consideration can be given on a case by case basis as to whether there is someone who it is appropriate to appoint as a health and welfare delegate or whether serious decisions should be made by a court. Accordingly, no amendments to the draft Law were considered necessary in view of the Viscount's comments here.

66 The Viscount commented that it is essential that those managing an individual's property, whether as an attorney or as a delegate, are given appropriate guidance as to how they are to manage that property in accordance with the provisions of the new Law. It was highlighted that the new Law will require a greater level of consultation with the person whose affairs are managed by the attorney or delegate and a greater level of sensitivity to situations where a person has capacity to manage some aspects of their finances and affairs, but not others and where the person's capacity fluctuates. The question was asked whether a delegate who, having applied the tests in Articles 4, 5 and 6 of the draft Law when supporting a client to make a decision, could be liable to the client for that.

**Response:** The principles set out in Article 3 of the new Capacity Law emphasise the importance of supporting a person to make a decision for themselves wherever possible. Where an attorney or delegate considers that a person lacks capacity to make a decision and the attorney or delegate is authorised to make that decision for the person, then the decision must be made in the person's best interests. Pursuant to Article 6 of the new Capacity Law, what is in the person's best interests should be established by encouraging the person to participate as fully as possible in the decision and having considered the persons wishes and feelings with respect to the matter.

It will be important to explain how attorneys, delegates and other people working with people who may lack capacity to make decisions should reflect these principles in practice. This can be addressed in the Code of Practice accompanying the new Law and by issuing appropriate guidance.

The Viscount's question raises an important point about providing reassurance to those who manage a person's property and affairs. If an attorney or delegate does so in full compliance with provisions of the new Capacity Law, they should not be subject to liability for doing so that would not have arisen if the action was taken with the person's consent. There will not be an appeal mechanism against decisions made as such, but the Royal Court will have powers to intervene and to remove an attorney or delegate where, among other things, they are no longer acting in the person's best interests.

In response to these comments from the Viscount, the draft Law was amended to provide an express immunity from liability in Article 8 for carers who, before doing acts in connection with care or treatment for a person who lacks capacity, properly assess capacity and make decisions in accordance with a person's best interests. It was considered appropriate to consider making similar provision about the management of a person's

property and affairs, and to whether it would be appropriate to make similar provision to that in Articles 34 and 36(1) and possibly (2) with regard to Attorneys.

67 The Viscount noted that the Court has the ability to appoint a delegate in respect of a person lacking capacity either generally or in relation to specific decisions and actions. The point was made that in making those decisions it will be important to strike a balance between protecting the person from the risk that the delegate will act otherwise than in accordance with the person's best interests with the need to ensure the efficacy and timeliness of decision making for a person. The concern is that the provisions as drafted could put a person off accepting the appointment because they would need to return to court more often than at present.

**Response:** We think this comment raises an important point with regard to the balance between effective decision making and appropriate safeguards. Article 35 of the new Capacity Law makes it clear that, subject to any limits placed on a person's authority by the Royal Court, a delegate who is appointed will be able to take such steps as are necessary or expedient in P's best interests. It was acknowledged that there was scope for confusion as to the application of Article 35 as originally drafted (and as to the as to the extent of the powers of a health and welfare delegate), in that it appeared to apply to both health and welfare, and property and affairs delegates, but sought to expressly confers powers that should probably only be exercisable by property and affairs delegates. The purpose of the provision in 24(3) is to ensure that the court gives consideration to placing limits on the powers of a delegate, however we recognise that it might be appropriate to place this obligation on the court in a different way that is more explicit about the nature of the balancing exercises to be carried out.

**Amendment:** Article 35(1) was amended so that, instead of the court being required to impose such conditions or limitations on the scope and duration of a delegate's authority as

are reasonably practicable, the court be required to impose such conditions or limitations on the authority of the delegate as it considers necessary to protect the best interests of the person in question.

68 A question was raised about the hypothetical situation where a person makes an LPA, but the person to be appointed is unable or unwilling to act, so that a delegate subsequently needs to be appointed in their place. It was asked whether any limitations placed by the donor of an LPA on the authority conferred by the LPA would be binding on a delegate.

**Response:** Article 11(3) provides that a person who appoints an attorney may limit the attorney's authority by including conditions or restrictions in the LPA. Such conditions would not be binding on a delegate who is appointed by a court, though if the Royal Court is aware of the LPA having been granted then it may take them into account in exercising its powers to place conditions or limits on the powers of a delegate. However, in determining what is in a person's best interests (as a delegate will be required to do when making decisions on behalf of a person), they must by virtue of Article 6(3)(a) consider the past and present wishes of the person, including where these are reflected in a written statement.

In the hypothetical situation presented, it will be appropriate, where a statement in an LPA is relevant to an issue to be decided by the delegate, for the delegate to consider a person's wishes as set out in an LPA. However, there isn't scope for conflict between the obligations of a delegate under Part 4 and the terms of an LPA and it is not considered to be unclear as to what is required by the Capacity Law in this situation. While it isn't possible to deal with every permutation in the Law itself, the CoP and guidance produced with the new Capacity Law provides further assurance to those working with it as to how to proceed.

69 A concern was raised regarding the rate at which fees and expenses may be recovered pursuant to the curatorship provisions in the Article 43 of the Mental Health Law 1969 and under Rule 13 of the Mental Health Rules 1971.

**Response:** Article 34(7) says that a delegate may be re-imbursed for reasonable expenses and may be entitled to remuneration if the Court directs. It is essential that remuneration can be paid to enable professionals to act as delegates. In view of the person's vulnerability, it will be important to ensure the extent of any remuneration is subject to appropriate limits to ensure that a person's assets are not inappropriately depleted by professional fees.

**Amendment:** It was accepted that the discretion of the court with regard to professional fees needed to be limited in some way. Article 34(7) was amended so that while it remains for the court to direct whether remuneration can be claimed, the amount of that remuneration should be limited so that it does not exceed any amount provided by the Minister by Order. The Minister has the discretion to make provision by Order with respect to the limits on professional fees that may be charged.

70 The Viscount raised important points about the reporting and conduct of inquests into deaths that occur where the person is subject to the authorised imposition of significant restrictions on their liberty.

**Response:** This point was discussed with the Viscount and it was considered necessary to amend (as a consequential amendment) the Inquests and Post Mortem Examinations (Jersey) Law 1995 ("the Inquests Law) to make it clear that deaths taking place in approved establishments where a person is detained pursuant to the Mental Health Law and or subject to an authorised significant restriction on their liberty under the new Capacity Law should be reported to the Viscount. Once reported the Viscount should, as at present under Article 2(4) of the Inquests Law, have discretion pursuant to Article 5 of the Inquests Law to

decide not to hold an inquest where he/she is satisfied that there are no grounds for doing so or a death certificate is produced.

71 The Viscount raises an issue with regard to the construction of Article 32 *Powers of charging and recovery of expenditure*. It was agreed that the provision required further consideration.

**Response:** After further consideration it was thought that there was value in retaining an express discretion for the court to make orders or directions with respect to the disposition of the property of a person who loses capacity that will ultimately enable another person to assist them to live the way they wish.

## Part 5 Capacity and Liberty

72 This is an area where the UK government has by common consensus made something of a dog's dinner of the whole process. It might be helpful if the proposals by Jersey in relation to Part 5 could be read in conjunction with the proposals in the UK Law Commission Paper '*Mental Capacity and Depravation of Liberty Consultation Paper 222'*.

73 A respondent raised concerns and questions as to how Part 5 will apply in practice. In particular, there was a concern that assessors should be properly qualified and independent, and that clinicians should be asked to evaluate whether a significant restriction on liberty should be imposed, rather than just providing evidence of the persons medical condition. There was a query as to whether the Law provides specific protection as a representative is only appointed for a person who doesn't have family or friends after they have a CAL authorisation in place. (Art 52)

**Response:** With regard to independence of assessors, rather than trying to achieve structural independence, it is more important to ensure that the tests for the application of significant restrictions on a person's liberty are applied in a way that is diligent and professional so as to protect against arbitrary interference with a person's liberty. Whilst achieving that it is important to make the application of the tests as straightforward for registered health and social care professionals as possible. The Minister will have a degree of control over the appointment of a registered professional to apply the tests and can adopt practices to ensure that conflicts of interest do not prejudice their proper application.

It was accepted that clinical perspectives should not be determinative with regard to the imposition of significant restrictions on liberty. Clinical perspectives should rather inform the decision by substantiating that the person has medical condition that means that they lack capacity.

A respondent also made a good point about the timing of an appointment of an Independent Capacity Advocate in respect of a person who has no-one else to represent their views. It was suggested that it would be better if such a person is appointed and able to make representations before authorisation is granted. In practice that might not always be possible but Article 51(1) makes it compulsory for a person to be appointed by the Minister if a report under 45(7) is made by the initial assessor

Respondents also raised a query over the content of Article 62(2)(c) and whether it would be requiring the manager of a relevant place to monitor and report on an ICA. It is important that there be safeguards where M sees something inappropriate going on between a support worker and a person, and regulations may require M to report any concerns regarding the conduct of the ICA to the Commission.

**Significant restrictions on liberty**

74 It was noted that Article 39(1) stated:-

> *"A measure listed in para (2) amounts to a significant restriction on P's liberty if it applies to P on a **regular basis**".*

75 It was noted that the term "*regular basis*" is not defined in Article 37 (the interpretation provision). It was felt to be unclear what the use of the word 'regular' means.

**Response:** The approach taken in the draft Law follows the line suggested by the Law Commission and the Scottish Law Commission, neither of whom would propose to define "regular". The difficulty with defining the term is that there might be an inadvertent exclusion in the new Law of circumstances that should fall within the definition in practice. The term is one that could be clarified in the CoP instead, by giving examples of what is regular to assist consistency in practice without making the law overly prescriptive. It should be recognised as the draft Law is engaged with care planning and professionals are being asked to step back and look at the type of restrictions they think will regularly need to be imposed to protect the person from harm, not at ad hoc situations.

76 At 39(2) there are a list of measures that amount to a **significant** restriction on P's liberty if used on a '*regular basis'*. Art 39(2)(a) states that if P is not allowed '*unaccompanied*' to leave that may mean that being given leave with family or friends would not amount to being unaccompanied?

**Response:** This provision will be further clarified in CoPs. However, it raises an important point. It has to be recognised that fundamentally it is significant restrictions on a person's liberty which are being authorised here. Being allowed to leave with family and friends (where that is in the person's best interests and is something they want) is not properly viewed as a restriction on a

person's liberty. The question would be whether the person would otherwise be prevented from leaving the place unaccompanied even though they are able to do so.

77 Article 39(2)(b) provides that a significant restriction on liberty includes where P is unable to leave the relevant place unassisted where the assistance is not being provided. It was suggested that use of the words "*reasonably practicable*" opens up issues. If a unit is understaffed on a regular basis would that then amount to reasonably practicable which would mean it did not amount to a significant restriction on P's liberty?

**Response:** This will also be clarified in the CoPs. It should be recognised that the development of the draft Law goes hand in hand with the introduction of the new Regulation of Care (Jersey) Law, which is aimed at encouraging and supporting best practice in the provision of health and social care. This does not open up issues provided appropriate care standards are followed, which is something that will be regulated. It should also be recognised that 39(4)(b) clarifies the application of this provision.

78 The definition of restraint includes (Article 9(2)):-

*a. uses or threatens to use force to secure the doing of an act which P resists* ***and***

*b. restricts P's liberty and movement whether or not P resists or objects to the restrictions.*

79 The proposed legislation has sought to draw a distinction between '**restraint'** and a '**significant restriction'** on P's liberty but (d) would seem to suggest that where restraint is used this in itself does amount to a significant restriction on P's liberty. In other words, the distinction between the two is removed.

**Response:** There was disagreement on this comment. The rationale in Article 39(2)(d) is that the person's actions are controlled and that they are controlled on a regular basis. The control might be through physical force or restraint, but the occasional use of restraint to prevent an immediate risk of harm would not amount to controlling the person's actions on a regular basis. Again it must be remembered that these tests will be being applied as part of the care planning process, not ad hoc.

80 There was a concern about the lack of clarity in Article 39(2)(f), in treating a definition of a **significant** restriction on P's liberty as restricting social contact (albeit on a regular basis). There are many institutions that regularly limit visiting to having to take place between particular hours.

**Response:** This paragraph should be read in light of Article 39(3), which would prevent the type of restrictions described from being treated as significant restrictions on liberty.

81 There was concern around Article 39 (3), which (in its original draft) stated:-

*c. "A measure applicable to all residents at a relevant place (other than staff employed at the place) which is intended to facilitate the proper management of that place shall not be regarded as a significant restriction on liberty".*

82 It was suggested that this was too great an exception. If, because of the nature of the residents at the particular place, the level of security was much greater in order to 'facilitate proper management' how could that not be a factor in considering whether or not it was a significant restriction on liberty? It was suggested that the paragraph be omitted.

**Response:** It is important to retain this provision as a limiting factor to prevent too wide a range of circumstances amounting to a significant restriction on liberty. The issue highlighted by this comment is probably more theoretical than real. There will be very few establishments where a person who is resident and would otherwise be allowed to come and go as they please, would be significantly restricted by nothing other than the inherent security arrangements at the establishment. If restrictions are imposed that will usually be demonstrably because they are warranted in relation to the particular person, in which case 39(3) would not apply.

83 There was some concern around Article 39(4), which provides -

*a) 'P is not to be regarded as subject to a restriction of liberty where P is wholly incapable of leaving the relevant place because of physical impairment and*

*b) Any limit as to the time or duration of any assistance provided to P, which does not excessively or unreasonably [disadvantage] P shall not be taken to mean that assistance is not provided'.*

**Response:** The potential imposition of significant restrictions on liberty necessarily requires that a manager report this fact to the Minister and that the Minister commissions an assessment. It is important that doesn't occur unnecessarily so as to avoid inappropriately wasting health and social care resources. In any situation where P is, by reason of physical impairment, wholly incapable of leaving the relevant place, it should be absolutely clear that the inability to take practicable measures to enable the patient to leave is excluded.

**Request for assessment**

84 It was noted that Article 40(4) allows an order granting a significant restriction of liberty for somebody who is also under a guardianship order. It was suggested that there needs to be much greater clarity in both new laws as to the relationship between these powers.

**Response:** The provision at Article 40(4) and elsewhere in the draft Laws with respect to the relationship between Guardianship and CAL is not unclear. A person subject to guardianship might be required to live in a number of different places under the new MHL, including in a private dwelling (where Part 5 of the Capacity Law will not apply). Indeed, once the new Laws are in place that will be the norm. However, on occasion a person subject to guardianship might be required to live in a relevant place. Where they do, this provision makes it clear that where significant restrictions are imposed on their liberty, then a CAL assessment will still need to take place. However, as is made clear in Article 43(5) where a restriction may be imposed by the guardian under guardianship, then that will result in a negative assessment (i.e. no CAL authorisation will be imposed). A CAL authorisation will only be required where the significant restriction exceeds the powers of the guardian. In those circumstances the person might be subject to both regimes, though it is expected that it would be the guardianship that would end where a person loses capacity permanently and is likely to remain in a relevant place. The different purposes to which some of the provisions in the draft Laws will be put in Codes of Practice and guidance in due course.

**Initial assessment**

85 An observation made as to the authorisation process was that there will be two assessors, one will be called '*the assessor'* and the other would be called '*the medical assessor'*. A comment was that the word 'assessor' is used in a multiplicity of situations outside deprivation of liberty and by using this term, it fails to identify the very special role which of course is the **independence** of the role that must be performed by 'the assessor'. The Law Commission suggest at paragraphs 7.63:-

d. *"In our provisional view, the best interest assessor should be central to the new system of restricted care and treatment. They want to develop a new approach which recognises the specialist role undertaken by best interest assessors…"*

86 It was suggested that a name be used which is unique to their role, for example 'independent assessor'.

**Response:** It is important to recognise that in making its recommendations in this regard, the Law Commission is reflecting on the particular experience in England and Wales, where they have had DoLS operating since 2009 and where they have consequently built up a pool of best interests assessors, some of whom are partially independent of local health and social services authorities (though most aren't), whose expertise they wish to continue to use in the new system. The Law Commission's recommendations focus on the performance of the co-ordinating role in relation to assessments in an appropriately professional manner and with a full understanding of the importance of proper assessment of capacity and best interests. The Law Commission doesn't propose that best interests assessors should carry out all or indeed even most of the actual assessments, which would be carried out under the restrictive care and treatment scheme, but that they would co-ordinate the assessment process.

It is important that all assessors are properly trained and supervised to ensure that the role is carried out properly and expect that good quality decision-making will flow from that. However, it is not an appropriate use of resources to try to recreate the English best interests assessors role, or to try and set up assessors as somehow structurally independent of HSSD. Doing so would limit the benefits that it is hoped will be gained by mainstreaming the use of CAL processes and ensuring that people are quickly and appropriately assessed before any authorisation is imposed.

**87** It was noted that at Article 44(2) the assessor has to carry out '*one or more interviews'* with P and with other such persons listed in paragraph (3). It was not understood why this list had originally included *'the person who is P's nearest relative within the meaning of mental health law '* and it had been suggested that this should be subsumed within the requirement to consult with the person appointed as representative? It was queried why the nearest relative should have a role in capacity legislation? If a person has not been detained under mental health law (and no nearest relative has been identifies) does this mean that one of the duties of the assessor is to identify the nearest relative?

**Response:** It is appropriate for the assessor to consult with the nearest relative, and others, in addition to a medical practitioner, if the assessor considers it necessary.

**Medical assessment and report**

88 It was noted that, as originally drafted, in the report that the medical assessor provides to the Minister he must include:-

> *"(c) Set out recommendations as to the nature and extent of any significant restrictions on P's liberty which, in all the circumstances, the medical assessor considers should be imposed and*
>
> *(d) If the medical assessor concludes that such restrictions should be imposed, state the maximum period, being no longer than one year for which those restrictions should be authorized.*

89 The logic of giving this role to the medical assessor was not understood. In the UK this is the role of the best interest assessor and surely doctors should do what doctors do best, namely deal with medical issues.

**Response:** There must be medical evidence of mental disorder justifying a deprivation of liberty in order for the deprivation to be lawful. Medical evidence should be specifically sought in respect of each authorisation. We could place reliance on medical evidence already required, or indeed we could limit the medical report to confirming that P lacks capacity, what the cause of the lack of capacity is and whether it justifies the imposition of the restrictions proposed by the assessor and for how long.

90 It was suggested that in the draft Law there had been no emphasis that in order to comply with ECHR the role of one of the assessors must **be independent**. This had been reiterated in Cheshire West at paragraph 57:

> *"Because of the extreme vulnerability of people like P, MIG and MEG, I believe that we should err on the side of caution in deciding what constitutes a deprivation of liberty in their case. They need a **periodic independent check** on whether the arrangements made for them are in their best interests.*

**Response:** An independent assessment is not required to found the authorisation. The new MHL does not provide for independent assessments before a person is detained under that Law and neither does the Mental Health Act 1983. What it provides is that the persons making the application are appropriately trained to be able to carry out their role in a professional manner. The independent check on the legality of a person's detention comes from the Tribunal.

**Effect of negative report**

**91** It was suggested that the draft Law did not emphasise sufficiently the massive implications of a negative report. If the finding of the report is that P **is** deprived of their liberty but it is **not in their best interest** clearly very urgent action has to be taken to ensure that either the depravation of liberty comes to an end or it is provided in way that is in a person's best

interest. The law should set out clearly whose responsibility it is to do this and that person must then report their actions to the Minister.

**Response:** Further provision was not required in the new Law to address this comment. The effect of a negative assessment is that it won't be possible to use the new Capacity Law as a legal basis for imposing those restrictions. Consideration might still then be given to using the Mental Health Law in appropriate cases, but otherwise the significant restrictions simply shouldn't be imposed. There is opportunity for M to ask for a re-assessment in Article 46, but otherwise the position is straightforward and M and the care team will need to look at other ways of providing care that is safe for the patient. It should be remembered again that the intention is that assessments take place as part of care planning and in advance of imposing significant restrictions on a person's liberty where practicable.

**Standard Authorisations**

92 It was noted that in Article 48(4) -

> *"Despite paragraph 3(d) the minister may authorize significant restrictions to be imposed on P's liberty which are different (whether in specific request or by their nature) to any such restrictions as may have been recommended by assessors."*

93 A concern was expressed around the need for independence when decisions are being made concerning the deprivation of a person's liberty. In the case of the *London Borough of Hillingdon v Neary*, it made it clear that in the UK, the role of the supervisory body (akin to the role of the Minister in Jersey) is '*not a rubber stamping'* exercise. A supervisory body is required to scrutinise the best interest assessment *''with independence and a degree of care that is appropriate to the seriousness of the decision''.* It was suggested that it was

difficult to see how this independent role could be performed by an officer of the State especially with the powers proposed in this Article.

94 It was noted that the Law Commission consultation paper at paragraph 7.105 refers to the fact that in the case of Neary, a key issue was the **lack of independent scrutiny** and poor best interest's assessment. Indeed the Law Commission provisionally are of the view that the supervisory body in the UK is unable to deliver an appropriate level of scrutiny.

**Response:** The Law Commission proposes that the supervisory authority shouldn't be required to scrutinise applications, because in practice that is not something they have been able to do and doesn't add value to the scrutiny process they are proposing. In Jersey, under the draft Law it will be very important to ensure that the person performing the scrutiny and oversight role on behalf of the Minister when granting authorisations is properly trained and does provide proper scrutiny of applications to make sure they are properly completed. The Minister is not the same as a UK supervisory authority. There are many such authorities in the UK and as such practice necessarily varies. It is not inherently impossible for an officer of the state to perform this role, what matters is that the role is performed with sufficient diligence and professionalism, which is something that can be expected of public officials, especially when Jersey has a much smaller pool to train than the UK does.

95 It was noted that in the entire draft Jersey law, the word '**independent'** only appears in the context of the independent capacity support worker. Indeed there is no specific reference to the independent capacity support worker having any role in cases involving '*significant restrictions'* in Part 6 apart from 67(2) which states that:

The States may by Regulations –

*"2(a) further make provision as to circumstances in which independent capacity support workers may challenge, or provide assistance for the purpose of challenging,*

*any decision under this Law or under the Mental Health Law affecting P or P's best interests; and*

*(b) amend paragraph (1)."*

96 For a role so crucial to the effective delivery of safeguards, there was some surprise that there is merely a discretionary enabling provision.

**Response:** It is important to leave sufficient flexibility to develop this role over time and to meet the needs identified as the Laws are implemented.

**Variation of authorization**

97 It was noted that in Article 50(2) (in a previous version of the draft Law) that the '*Minister has to be satisfied'*, that there is likely to be no change in the *'standard or nature of the care or treatment to be provided'* and, if so, may amend an authorization in respect of the identity of M or the registered provider.

98 It was noted that there appeared to be nothing to indicate how the Minister would satisfy themselves if this was the case. It was suggested that there should at least be a requirement of a report from an independent capacity advocate to the minister before such information can be granted?

**Response:** This is a question of care standards**.** It should be remembered that the new Law is being brought forward at the same time as the States of Jersey is preparing to implement the Regulation of Care (Jersey) Law 2014, which will provide a comprehensive system for monitoring care standards and regular inspections of care homes and nursing homes. This system will provide sufficient information for the Minister to make such an evaluation and a Report from an ICA would better inform the Minister on this issue.

**Urgent Authorizations**

99 It was noted that Jersey is, in a sense, one step ahead here of the UK system as can be seen from the provisional view expressed by the Law Commission on this point at paragraph 7.200 on page 119. They state:

> *''it is important that restrictive care and treatment enables professionals to respond in cases of emergency. However, we are concerned that enabling self authorization by care workers is one of the least satisfactory elements of the DoLS''.*

100 Their proposal is that the equivalent of a best interest assessor will be able to give temporary authority of the care and treatment pending a full assessment. A concern expressed with the draft Law is that firstly, the Minister may become, in effect, a rubber stamping exercise secondly, the Minster is not independent and finally, the urgent authorization can continue until the standard authorization is granted. This could be weeks or potential months later. It was suggested that it is quite wrong that any sort of urgent authorization should continue beyond the period at which it is urgent.

**Response:** The period of urgent authorisation is limited by the limits placed on the standard authorisation process, which requires that each of the two assessors reports is prepared within 14 days. The Minister is not independent, but see further comments above, we don't think that independence is necessary, just that sufficient professionalism and diligence is shown by all involved.

**P to be Notified of Grant of Urgent Authorization**

101 It was noted that at Article 55(1)(b) (in the original draft of the Law) there was a reference to:

*"the rights of advocacy, support, representation and review which are available to P under this Law in respect of the authorization"".*

102 It was noted that there appeared to be no reference to the right of appeal and there was confusion as to why this word is not being used.

| **Response:** This is deliberate, both under the draft Law and the mental health law the Tribunal carries out a review of whether the detention / significant restriction is warranted at the time of the review. It does not hear an appeal against the original decision to detain / impose the significant restriction. This is appropriate because it is the concrete situation of the person at the time of the review that is important to deciding whether any detention / significant restriction should continue and not whether the original decision was correct. |
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**Standard Authorization: Review by Manager**

103 There was some surprise that at Article 57(3) (in an original draft of the Law) that M may cease to impose restrictions where this paragraph applies. It was suggested that M **must** cease to impose significant restrictions in the circumstances.

| **Response:** This comment was accepted and the draft Law was amended. |
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**Review of Authorizations by Tribunal**

104 One comment raised was that this provision did not go far enough. It was queried how someone deprived of their liberty triggers an appeal? Strasbourg and UK case law make it clear that there is a **positive duty** on public authorities to ensure that a person deprived of their liberty is not only entitled but **enabled** to have access to the law so that detention can be reviewed speedily by a court. This was one of the issues dealt with by the case of *London*

*Borough of Hillingdon V Neary.* Number of cases such as *Winterwerp v Netherlands (1979 – 80 2EHRR387)* and more recently the case of *AJ v A Local Authority [2015] EWCOP* show that the applicant is not required as a precondition to enjoying the protection of an appeal to show on the facts that their case stands in a pretty good chance of success and *''there is no place in article 5(4) for a best interest decision about the exercise of that right''.*

105 It was suggested that in order for the draft Law to be compliant with human rights law there is a requirement that there must be some sort of **automatic reference** to the Tribunal.

**Response:** The mechanism under the draft Law is similar to that under the MHL namely the making of references by the Minister or Attorney General in appropriate cases.

**Powers of Court in relation to Grant etc of Authorizations**

106 It was suggested that in order to reduce the potential flow of cases to the Royal Court, it might have been helpful to insert specifically that an authorization is to be preferred (if applicable) to an order of the Court. This comment was made because if an order of the court is sought, this in itself (if the UK example is anything to learn by) will defeat a person's right not only because of costs, but also in relation to delay.

**Response:** It was not felt necessary to insert such a provision at this time. The only persons expected to apply for authorisation would be the Minister / Attorney General and they would only do so where other process could not be used.

**Appeals**

107 There was confusion as to the requirement for Article 62(4) (per the original draft) which stated:

*''no decision of the Tribunal should be invalidated solely by reason of procedural irregularity, unless that irregularity was such as to prevent a party to the appeal from presenting his or her case fairly before the Tribunal''*.

108 It was suggested that it is the following of 'procedures prescribed by law' that provide protection for decision makers. It was suggested that it seemed odd to enshrine in law that where an organisation has **not** followed the procedure prescribed by law they will nevertheless be protected.

**Response:** The point is that decisions of the Tribunal shouldn't be displaced for minor and technical errors, it will be for the appeal court to decide whether the irregularity was sufficiently material to warrant the appeal succeeding.

**Effective Change in Management Responsibility etc.**

*109* It was suggested that this introduces a concept not found in the UK, namely that a person can be **moved** from one place where they are deprived of their liberty to another place where they will be deprived of their liberty without the need for a fresh authorization. There was particular concern with Article 63(2) (per the original draft) which states:

*'' unless the minister otherwise directs the authorization in question shall continue in effect as though for the first relevant place there were substituted the new place''.*

110 It was noted that it is for the manager of the first relevant place to notify the Minister and this is merely a **notification**. There is nothing here to question the proprietary or indeed the best interests of P. The person can therefore be moved to a totally different place where perhaps the conditions are a great deal more restrictive and where it might be possible that no authorization would have been granted as being in that persons best interests. The mere

fact that they are transferred to that place means that there will be no fresh independent assessment.

**Response:** The conditions could not be more restrictive as only measures of a particular type are authorised and could be employed in the second relevant place. A fresh assessment will be required if the nature of the significant restrictions to be imposed will change substantially.

**Authorization as Authority to take and Convey P**

111 It was suggested that in every circumstance the conveying of P is done under the provisions of the Mental Capacity Law as a best interest decision. Conveying will only amount to a deprivation of liberty in the most extreme circumstances. It was suggested that this Article was not required.

**Response:** The Mental Capacity Act 2005, in contrast to the MHA did not include powers to lawfully detain and convey a person to a place in which their detention is authorised. The absence of lawful authority to take someone into custody and convey would create a disparity with the Mental Health Law and would call into question the lawfulness of any such action. The question is not one of Deprivation of Liberty necessarily, but is one of vires and it is better to put the position beyond doubt.

**Part 6 Independent Capacity Support Workers**

112 It was noted that the dictionary definition of support worker is '' *a person employed to support and supervise vulnerable infirm or disadvantaged people or those of the care of the state''*. It was suggested that this is a totally inappropriate term because there is enough confusion already about the support worker's role is. There was confusion as to why there seemed a reluctance to use the term **independent capacity advocate** which, it was suggested, would be a much more appropriate term.

113 It was recalled that the proposed change in title to support worker was widely challenged by other professionals at the initial workshop consultation last year. It is disappointing that these views, having been sought, were not respected. The title Independent Mental Health Advocate is, after some 9 years, now well understood in Jersey amongst almost *all* professionals and more importantly amongst service users. The arbitrary change of this title to “support workers” serves merely to confuse the role. Furthermore it would suggest an entirely different approach, training and qualification be developed to that already adopted in England, Scotland and Wales. The UK Code of Practice states that an IMCA should: “represent the person without capacity in discussions to work out whether the proposed decision is in the person’s best interests” and “raise questions or challenge the decisions which appear not to be in the best interests of the person”. Once the advocate has taken the above steps they must evaluate the information gathered and provide a report to the local authority. It was suggested that this is quite different to the reality of the role of a Support Worker.

**Response:** This concern regarding not adopting the term ‘independent capacity advocate’ in the new Law was understood. The term ‘independent capacity advocate’ was adopted.

**66. Appointments of Independent Capacity Support Workers**

114 It was noted that, at Article 66(2) (as per the original draft), regulations define some but not necessarily all of the roles. There was a concern that it will be left to regulations to set these out. It was suggested that the role of the ICSW should be clearly defined by primary legislation.

**Response:** The matters which may be provided for in regulations are not aspects of the ‘role’ of the ICSW. The ‘role’ of the ICSW is illustrated by the functions detailed in Article 63. Article 62 relates to the appointment, monitoring and termination of the appointment etc of the ICSW.

The purpose of Article 62(2) is exemplary, to give a non-exhaustive list of the types of matters relating to the appointment of a ICSW that may be provided for in regulations. The scope of those regulations is not without limit; the regulations must relate to the general purpose spelt out in Article 61(1). Using regulations to flesh out aspects of the ICSW appointment and role, which will become clearer as the Law is further implemented, is a common legislative mechanism. A similar approach is taken in the MCA 2005 (s.35) which places a duty on the Secretary of State to make arrangements for the provision of an IMCA service and s.35(2) provides a regulation making power for stipulating provisions as to the appointment of IMCAs.

In Article 62(2)(c), 'M' refers to the manager of the relevant approved establishment, not the Minister. Article 62(2)(c) envisages regulations elaborating on the circumstances in which M would report to the Commission on the interaction between those ICSWs representing patients within that establishment. The report might cover the number of visits, interviews and requests for records made by the ICSW, for example.

115 It was noted that Article 66(2) (f) (as per the original draft) talked about the functions being placed in regulations and then 67 indicates the functions of the ICSW. There was some surprise to find an omission in proposals for new law where there is a 'significant restriction' on P's liberty. There was surprise as to this omission particularly bearing in mind a perceived lack of independence of the entire process as referred to above.

**Response:** On reflection it was felt there was no need to include Article 66(2)(f). Article 63(2)(b) (new numbering) provides a regulation making power to amend the functions set out in Article 63(1).

*116* It was suggested that the wording in Article 66(4) (per the original draft) was vague with the addition of the words *''so far as practical''.*

**Response:** This wording followed s.35(4) of the MCA 2005. 'Practicable' is not a vague term. There are a number of judgments from the English Courts which would provide guiding precedent to an interpretation of this Article for practitioners or the Jersey Court. 'Practicable' does not equate to 'possible' (*Owen v Crown House Engineering*) and Scarman LJ set out a legal interpretation of 'practicable' in *Dedman v British Building and Engineering Appliances Ltd* which has been used to interpret use of the term in the context of the MCA 2005. In the context of Article 62(4) 'so far as practicable' means that reasonable steps should be taken to make arrangements for someone to be represented and supported by an independent person, however any steps taken in seeking to obtain independent representation should not be disproportionate.

117 It was suggested that Article 67 (per the original draft) required considerable development. There was a query as to whether it was suggesting that Article 67 is utilised every time a best interests decision is made?

**Response:** The decisions with which an ICA will be involved are those specified in Article 64 and 65, i.e. as to serious medical treatment and arrangements for changes to P's accommodation. An ICSW may also be involved in decisions relevant to the representation of a patient for the purposes of Part 5 also. Article 63 is not to be utilised every time a best interests decision is required to be taken. Note that the functions specified in Article 63 follow those specified in s. 36 of the MCA 2005.

118 While the importance of the advocacy role was accepted, it was suggested that the role of the ICSW is to support the best interests decision maker when the decision maker is

carrying out their lawful obligations under Article 6. It was suspected that because of the way the law is proposed, decision makers, particularly in more difficult cases, will defer to the ICSW to undertake tasks that are legally theirs.

**Response:** An ICA is required to support P and P's best interests, not the person making the decision. Codes of Practice, to be written pursuant to the new Law, will provide guidance for decision makers as to the nature and remit of the role of the ICSW.

**Code of Practise**

119 It was suggested that the words **must** should replace the word **may** and that there should be a statutory time limit for the Minister to do this. It surely must be done before the new law comes into effect. This point is reinforced by 72(2) because it would not be possible for a person to have regard to the relevant code, if one was not in existence.

**Response:** There should be a discretion here, though it is one the Minister will exercise to create at least one code. There is no contradiction with 72(2), a person is only required to have regard to any relevant code of practice. If one is not created then self-evidently he does not have to have regard to it.

The project team would like to thank all those people who have been involved in the process of developing this new law and for taking time to attend presentations read reports and responding in writing.