



Capacity and Self-Determination (Jersey) Law 2016

Annual Report

Jersey, 2021 – 2022

Published pursuant to Article 4(2) of the Mental Health (Jersey) Law 2016

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Approved by the Mental Health and Capacity Legislation Oversight Group on 26 September 2023.

This official report provides the findings under the Capacity and Self-Determination (Jersey) Law 2016, Significant Restriction on Liberty data collection, for the period 1 October 2021 – 31 December 2022.

Note – the previous year reported was 12 months. However, this report contains data for 15 months, to bring the reporting period in line with the calendar year and assist easier interpretation of data in future years.

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1 Introduction

The Capacity and Self-Determination (Jersey) Law 2016 (CSDL) is a significant piece of legislation which came into force on 1 October 2018.

The fundamental principle of the CSDL is that individuals who are aged 16 and over are assumed to have the capacity to make decisions for themselves, unless it can be shown that they are unable to do so at the time the decision needs to be made.

The CSDL supports those who have capacity and choose to plan for their future. It also protects those who lack capacity, by ensuring that any decisions made on their behalf are done so in their best interests, with regards to their beliefs and values.

2 Human Rights

Jersey introduced the European Convention on Human Rights (ECHR) into our law through the Human Rights (Jersey) Law 2000. This legislation gives further effect to the rights and freedoms guaranteed under the European Convention on Human Rights.

ECHR Article 5 provides that "Everyone has the right to liberty and security of person. No one shall be deprived of his or her liberty (unless) in accordance with a procedure prescribed in law".

The CSDL provides safeguards and a legally defined process for those people who lack the capacity to make decisions around their residence, care or treatment, and who are subsequently being restricted in their liberty, as required by ECHR Article 5.

Restrictions are authorised when in the person's 'best interests' and for the purposes of necessary care and treatment. This might mean that the person may be required to stay in hospital or a care home for their safety or welfare. In Jersey this is called a Significant Restriction on Liberty (SRoL) and is the focus of this report.

3 Capacity and Self-Determination (Jersey) Law 2016

- 3.1 Part 1: Interpretation and general principles

Where a person has been assessed not to have capacity, the CSDL allows a decision to be made in the person's best interests, with regard to their past and present wishes and feelings, beliefs and values, and other factors that

the person would likely consider, if able to do so. Article 7 of the CSDL sets out excluded decisions which cannot be made on another person's behalf.

Article 3 of the CSDL sets out the values that underpin the Law. The five core principles are:

1. *a person must be assumed to have capacity unless it is established that they lack capacity;*
2. *a person is not to be treated as unable to make a decision unless all practicable steps to support them to do so have been taken without success;*
3. *a person is not to be treated as unable to make a decision merely because they make an unwise decision;*

Note: only if a person is unable to make a decision due to an impairment of the mind or brain should principles 4 or 5 be used.

4. *an act done, or decision made, under the Law for or on behalf of a person who lacks capacity must be done, or made, in their best interests;*
5. *before an act is done, or a decision made which is restrictive of a person's rights and freedom of action, regard must be had to whether the purpose for which it is needed can be achieved as effectively in a less restrictive way.*

- 3.2 Part 2: Lasting Powers of Attorney

The CSDL provides that a person who has mental capacity can put in place a 'Lasting Power of Attorney' (LPA) for either, or both, health and welfare matters and financial affairs. A health and welfare LPA covers issues such as medical treatment, and wishes relating to life-sustaining treatment, or the refusal of such treatment. A finance LPA deals with property and financial affairs including the powers to pay debts, make financial gifts and sell assets. The LPA needs to conform to certain requirements and be registered by the Judicial Greffe to have legal effect.

LPA guidance: <https://www.gov.je/Caring/Capacity/pages/lastingpowerofattorney.aspx>

- 3.3 Part 3: Advance Decisions to Refuse Treatment

The CSDL allows a person to make a decision to refuse treatment if they should lose capacity to give or withhold consent in the future. An Advance Decision to Refuse Treatment (ADRT) can be used to refuse any treatment but cannot include a request to have treatment or to end life. Medical professionals are required to act in accordance with any valid ADRT.

ADRT guidance: <https://www.gov.je/caring/capacity/pages/capacityselfdeterminationlaw.aspx>

- 3.4 Part 4: Appointment of Delegates and related powers of the Court

The Royal Court of Jersey can appoint a delegate where a person has not taken the opportunity to draw up an LPA, and then loses mental capacity. Rather than giving lasting powers, the appointment of a delegate is limited in terms of time and of the scope of the decisions they can make. The Court will retain an overall supervisory power.

Delegate guidance: <https://www.gov.je/Caring/Capacity/Pages/BecomingADelegate.aspx>

- 3.5 Part 5: Capacity and Liberty

This part defines restrictions on liberty and provides safeguards when those restrictions become significant (SRoL). The safeguards allow significant restrictions on liberty to be made lawful through the authorisation process. The safeguards also provide a right to review of such authorisations.

Part 5 is described in more detail later in the report.

- 3.6 Part 6: Independent Capacity Advocates

The role of Independent Capacity Advocate (ICA) was introduced in the CSDL. An ICA ensures that a person who lacks capacity and has no-one independent who is appropriate to be consulted, has their rights and wishes taken into account.

My Voice Jersey has been awarded the contract to provide this service currently. A report detailing their interventions is provided to the Commissioner quarterly and to the Minister for Health and Social Services (Minister) annually.

4 Capacity and Liberty

Part 5 of the CSDL deals with restrictions on liberty for people who lack capacity to make the relevant decisions. It provides definitions of such restrictions and introduces safeguards which allow significant restrictions on liberty to be made lawful, through 'standard' or 'urgent' authorisation processes.

Where a person has been identified as lacking capacity and requiring significant restriction on liberty (SRoL) to enable their care or treatment, the Manager of the place where the person is having their liberty restricted has the responsibility to apply to the Minister for authorisation, as prescribed in the Law.

Where the application has been duly made, six assessments will be undertaken, as explained below.

- 4.1 Significant Restriction on Liberty assessment process

1. Age – a person must be aged 16 years or over and if there is any doubt then a full assessment must be carried out.
2. Capacity – to establish whether the person lacks the capacity to make decision(s) about their care or treatment because of an impairment or disturbance of mind or brain that is affecting decision making, in accordance with Article 4 (lack of capacity) of the CSDL.
3. No refusals – to establish whether there are any legal decision makers whose views might conflict with an authorisation of an SRoL.
4. Best Interests – to ensure that the decision being made is in that person’s best interests, in accordance with Article 6 (best interests) of the CSDL.
5. Mental Health – to establish whether the person is suffering from an impairment or disturbance of the mind or brain.
6. Eligibility – to establish whether a person is, or should be, treated under the Mental Health Law (Jersey) Law 2016.

The assessors provide reports to the Mental Health & Capacity Law Administrator, who receives these through delegated authority of the Minister. Where the reports confirm that the restrictions placed on a person lacking capacity are proportionate, necessary and in the person’s best interests, the restrictions are authorised.

5 SRoL Applications

- 5.1 Places where SRoL applications have originated from

Place	Number of applications duly made	Number of applications rejected as not duly made*
Designated Relevant Places**	17	9
Hospital & Hospice	288	170
Residential and Nursing Homes	284	106
Total	589	285

* When an application is rejected as not 'duly made', applicants are given guidance so that they can re-submit a properly completed application, if the person fits the criteria for requiring an SRoL application.

** A designated relevant place means a place designated by the Minister pursuant to Article 37(3) CSDL for the purpose of assessments to be carried out in accordance with Part 5 of this Law.

6 SRoL Completions

Total number of SRoLs completed	490
Number of Standard Authorisation SRoLs authorised	293
Number of SRoLs not authorised, as P was found to have capacity to make the relevant decision themselves	20
Number of SRoL applications withdrawn	177

There were 589 applications for SRoL received during this period and 490 completed. The number of completed SRoL applications does not correspond with the number of applications made, as some are not completed in the same reporting period.

The number of completed applications includes 293 which were granted and 20 which were not granted due to the Capacity and Liberty Assessor finding that the person had capacity to make the decision for themselves. 177 applications were withdrawn due to reasons including that the person had regained capacity, had been discharged home, was detained under the Mental Health (Jersey) Law 2016 or had passed away.

- 6.1 Completion time

A person may need to be significantly restricted before the Minister can respond to a request for a standard authorisation. In these circumstances, the hospital or care home can facilitate an urgent authorisation, and at the same time request a standard authorisation.

Subsequently, the six assessments described earlier, following an urgent application, must be completed in 28 days from application date and, for a standard application, are to be completed within 21 days of an assessor being allocated.

There have been difficulties in ensuring the availability of the Capacity and Liberty Assessors and, where necessary, medical assessors, in close time proximity and within the statutory timeframes, this was made more difficult due to the Coronavirus pandemic, as some care homes were not accessible to the assessors which has led to a backlog.

Now that the staff group is stabilising, which is discussed further below, it is hoped that there will be an improvement in the timeframe in which authorisations are granted or refused, with the ambition that the statutory deadlines will be met.

- 6.1.1 Urgent Authorisation

455 urgent SRoL authorisations were granted.

- 6.1.2 Standard Authorisation following Urgent Authorisation

Number of applications completed	Required completion time	Actual completion time (median)
173 granted	28 days	62 days
18 not granted	28 days	59 days

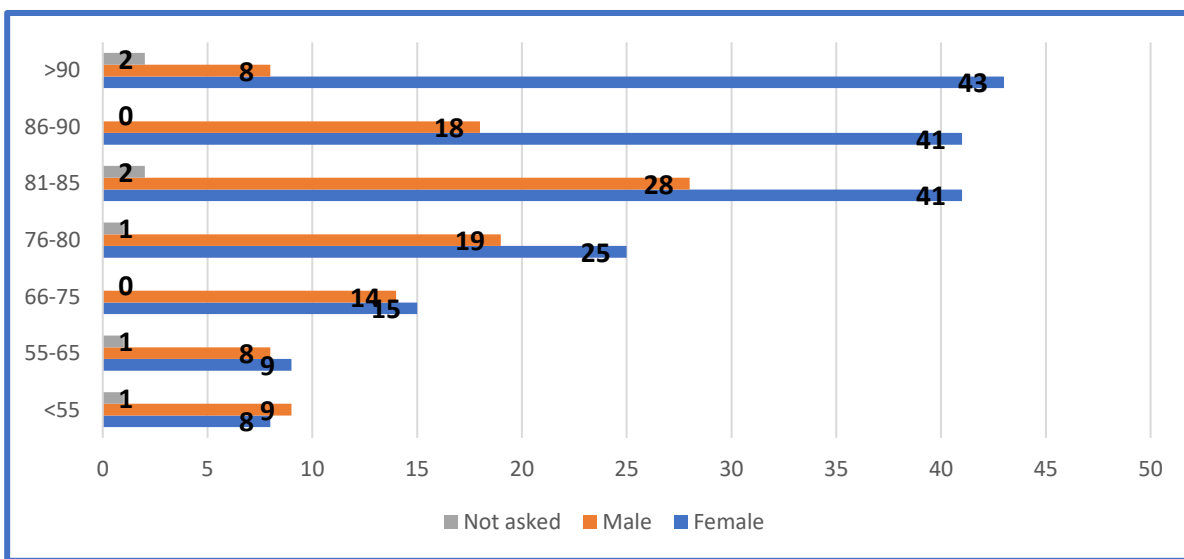
- 6.1.3 Standard or Renewal Authorisation

Applications are allocated chronologically. However, urgent and renewal applications are prioritised over standard applications.

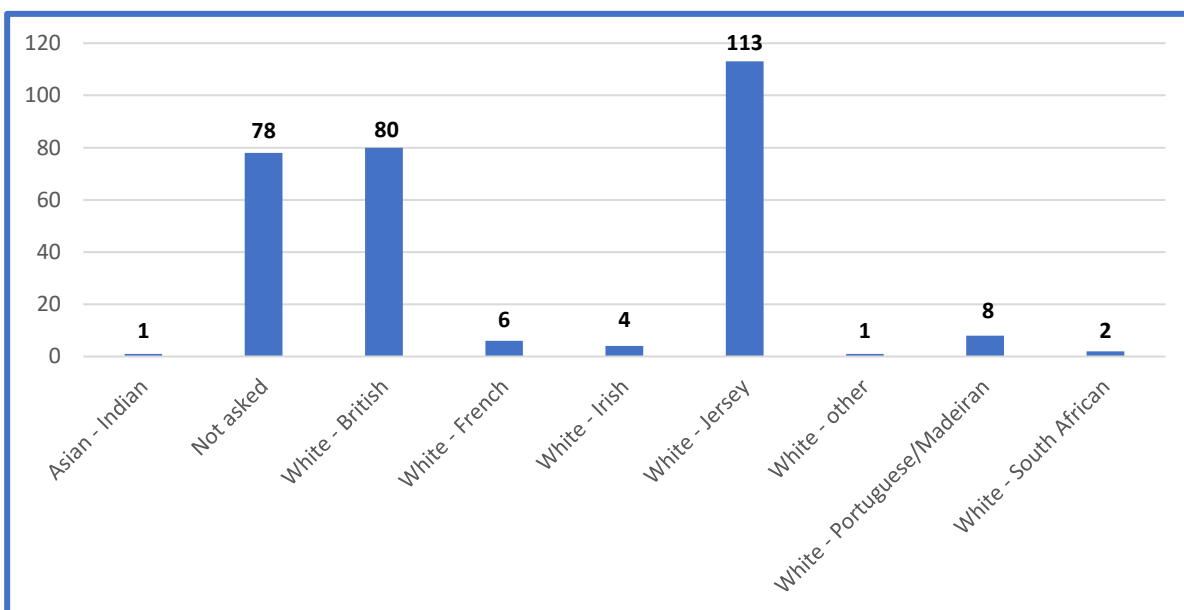
Applications are allocated based on research completed in England and Wales which concluded that a Best Interests Assessor’s (equivalent of Capacity and Liberty Assessor) assessment can be completed in an average of twelve hours. The ‘bedding in’ of the Capacity and Liberty Assessor’s role will enable review and adjustment for Jersey’s needs, as appropriate.

Number of applications completed	Required completion time	Actual completion time (median)
120 granted	21 days	31 days
2 not granted	21 days	23 days

- 6.2 Age & gender profile of people subject to Standard SRoL authorisation



- 6.3 Ethnicity profile of people subject to Standard SRoL authorisation



7 Capacity and Liberty Assessors

Each SRoL assessment provides an opportunity for independent scrutinization of the person's care and treatment. The Capacity and Liberty Assessor role, being independent and backed by a statutory framework, allows them the autonomy to identify and challenge issues, both current and historical, for the vulnerable people they are assessing. The Assessors have made referrals to the Safeguarding Team when appropriate and it is hoped that this will help lead to real change and improvements to care delivery in a variety of ways and deliver improved outcomes for people who lack capacity.

During this reporting period there were initially two full-time Capacity and Liberty Assessors and four full-time Authorised Officers, who work primarily to fulfil the requirements of the Mental Health (Jersey) Law 2016 and completed SRoL assessments as a secondary function to their role. There were in addition a further 25 practitioners who are employed in other roles in the Government of Jersey but undertook up to four assessments as an addition to their role.

A further Capacity and Liberty Assessor was appointed in April 2022 whose role includes a training function to support all professionals with roles under Part 5 of the CSDL to be aware of and able to carry out their responsibilities. A further full time Capacity and Liberty Assessor was appointed in October 2022. The full time Authorised Officers (who are also Capacity & Liberty Assessors) moved into a new team with new roles as part of the Community Mental Health Redesign from November 2022, which has reduced capacity for the completion of SRoL assessments.

In addition to those posts, in December 2022 a locum was appointed as a Capacity and Liberty Assessor for a period of three months, to deal with the backlog of assessments which has accrued because of difficulties mentioned earlier in the report.

The service is committed to continuous professional development for all approved Capacity and Liberty Assessors and facilitates annual refresher training as well as group supervision which runs throughout the year. The Capacity and Liberty Assessors are now subject to an annual reapproval process, which was introduced in 2023 and the details of this will appear in the next annual report.

8 Medical Assessors

During the SRoL assessment process, the CLA must consider medical evidence from a registered medical practitioner as to any impairment or disturbance in the functioning of a person's mind or brain. Where there is no sufficiently recent medical evidence, a registered medical practitioner designated by the Minister will visit the person subject to the SRoL application, to make an assessment.

Local psychiatrists have been contracted to complete these assessments on a private basis outside of their daily work. Currently only one local psychiatrist is fulfilling this role and therefore this arrangement is being reviewed to ensure that adequate contracted provision is in place to guarantee robust and safe provision to ensure that the service can always be provided within the statutory timeframe. Consideration is underway to pilot communications with General Practitioners, to confirm any impairment or disturbance in the functioning of the person's mind or brain with those who know the person best.

Training has been commissioned for the medical assessors' continuing professional development in this role and is now being provided.

9 Tribunal

ECHR Article 5 also guarantees that any person subject to an authorised SRoL is entitled to have that decision legally reviewed, promptly.

It is the responsibility of the Manager who made the application for the SRoL to ensure that the person and their representatives understand their rights to apply for an independent review. If the right to review is breached, the person might be entitled to seek compensation.

The Mental Health Review Tribunal (Tribunal) is independent from the Government of Jersey and provides an opportunity for people who are subject to an authorised SRoL to have that decision reviewed.

The Mental Health and Capacity Law Administrator, on behalf of the Minister, requests a review of authorisation for a person who appears to be objecting to their restriction, or where a person with authority conferred by a health and welfare LPA, objects to the restriction of the person. This is felt necessary and proportionate to uphold ECHR Article 6, that being the 'right to a fair hearing'.

Objections to residence can include what a person says or how they behave. This can include asking to leave or physically trying to leave the premises. It is considered that such statements or actions may be an indication that the person would wish to apply to the Tribunal if they had the capacity to do so.

On behalf of the Minister, the Mental Health and Capacity Law Administrator made 12 requests to the Tribunal for the review of authorised SRoLs. Three were withdrawn for reasons such as the Manager notifying the Minister that the SRoL was no longer required. Eight reviews led to the person remaining subject to SRoL authorisation and one review, with the request made by the Minister in December 2022, is yet to be heard by the Tribunal. The length of time that is currently taken to convene a review when required is significant; this will be explored with the Tribunal with a view to reducing this.

- 9.1 Mental Health Review Tribunal reviews

Number of requests for review made	Number of reviews heard	Number of days from request until hearing (median)
12	8	69

There have been no other requests made to the Tribunal for the review of an authorised SRoL.

10 Summary

	2019/20 (12-month period)	2020/21 (12-month period)	2021/22 (15-month period)
Number of 'duly made' applications	234	377	589
Number of applications rejected as not 'duly made'	Not recorded	102	285
Number of standard SRoLs authorised	125	254	293
Completion time following urgent application	126 days	79 days	62 days
Completion time following standard/renewal application	214 days (number of days from <u>application</u> to completion)	51 days (number of days from <u>allocation</u> to completion)	31 days (number of days from <u>allocation</u> to completion)
Number of standard SRoLs not authorised	8	16	20
Number of applications on pending list at end of reporting period	96	67	145
Number of Tribunals heard	<5	12	8

The summary shows that the application rate is increasing, as we had expected. This shows an increase in the awareness of the requirement on responsible managers. The rejection rate of SRoL applications is high and

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therefore a project was undertaken to review this. The outcome was amendments to the application form, through consultation with managers, and it is hoped that this will show effect in the next reporting period, by a lower rate of rejected applications.

We also see from the summary that the completion time for assessments is reducing, and this is positive. However, the outstanding number of applications to deal with has increased, following the increased rate of applications. We hope that the next report will show that the extra staff resources have reduced this backlog.

11 Training

The CSDL affects everyone aged 16 and over in Jersey. The adoption and understanding of the legislation does not hinge upon the legal framework alone, as it requires cultural change in attitudes towards mental incapacity. To achieve this, post-implementation work continues to support both the public and professionals in their understanding and use of the legislation in everyday life.

As such, in addition to capacity and liberty assessments, staff are also delivering on other key statutory objectives. This includes, but is not limited to, training and development throughout Jersey. There continues to be a leading strategic role in the ongoing implementation of the CSDL as the legislation embeds into professional practice and public life.

As mentioned earlier in the report, a Capacity and Liberty Assessor who also has a training role has now been employed, with the aim of them supporting professionals with roles under Part 5 of the CSDL to be aware of and able to carry out their responsibilities.

Over 119 sessions have been delivered to various professional groups on the island, as well as third sector organisations and community groups. There is also an offer of 1-2-1 support for members of the public and professionals.

The Capacity and Self-Determination Law Lead delivers training monthly in a session organised by The Care College, open to all agencies and care providers. Through Jersey General Hospital the CSDL Lead presents at the Adult Safeguarding Level 3 Training Programme as well as delivering presentations to Allied Health Professionals monthly.

Further, where requested, specific training has been provided to managers who have responsibilities within the CSDL, and staff within their establishments. Guidance has been created on how to complete the required applications for these managers and has been provided upon request.

The SRoL application form has been amended through consultation with managers, to assist them in making legally valid applications in a timely manner and it is hoped that this will show effect in the next reporting period, by a lower rate of rejected applications.

12 Post-implementation Working Group

A post-implementation working group for the CSDL, comprising of colleagues from HCS, the Judicial Greffe, the Strategy, Policy, Planning and Performance Department and the Law Officers' Department meet once per quarter to discuss developments and the use of the Law.

The working group, overseen by the Mental Health and Capacity Legislation Oversight Group, has been working towards preparing amendments to the CSDL to address a range of issues which have arisen.

The first set of amendments will include various corrections to typographical errors or incorrect references in the Law. The most significant of these will be replacing the word 'and' with the word 'or' in Article 9(2) to correct the Law drafting, so that restraint can be both physical and medical in nature, as was the initial intention. It is expected that this set of amendments will be lodged in 2023.

The Working Group will continue to work on developing resolutions for additional issues seen within the use of the CSDL. It is envisaged that any legislative amendments required to deal with these matters will be brought forward in two further stages, with the second stage having been scoped before the end of 2023.

13 Legislation Oversight Group

The Mental Health & Capacity Legislation Oversight Group has been formed to provide oversight and assurance to the Minister for Health and Social Services in relation to the lawful and effective application of all aspects of Jersey Mental Health and Mental Capacity Legislation.

The membership of the Group includes:

Executive Director of Mental Health & Adult Social Care

Mental Health & Capacity Law Administrator

Clinical Lead (Mental Health)

Head of Inpatient Mental Health Services

Head of Community Mental Health Services

Chief Social Worker

Lead Social Worker (Mental Health)

Head of Learning Disability Services

Chief Executive Officer of My Voice Jersey

Chief Inspector / Mental Health Lead, States of Jersey Police

Senior Officer – Clinical Governance & Risk, States of Jersey Ambulance Service

Associate Chief Nurse, General Hospital

Lead for Capacity & Self Determination Law

Mental Health Improvement Lead

Team Manager, Crisis and Assessment Team

CAMHS service manager.

The Assistant Minister with responsibility for Mental Health has a standing invite and has attended a number of meetings.

The Group meets monthly with the aim of identifying, monitoring and mitigating risks in relation to the use of relevant legislation as well as identifying areas for improvement, action or development. The Group reviews and develops policies and procedures in relation to the use of relevant legislation and oversees both the quality of and compliance with training associated with relevant legislation.

14 The Future

As the team of Capacity and Liberty Assessors has recently established, it is hoped that the backlog of assessments will be brought up to date in the next period and this is a key priority.

Following that it is hoped that auditing of relevant places can commence. Some of the feedback received from managers of relevant places is that they would be further helped to understand the CSDL and their responsibilities within the Law by some practical training inside their establishments and it is hoped that this will be provided.

It is also relevant to mention that a review of the current data systems - and implementation of software to assist with the monitoring of cases - could provide better data and support the provision of the service. Currently, HCS uses a number of different software systems (including Carepartner and TrakCare) and relies heavily on the use of Excel spreadsheets to capture and monitor relevant data. We intend to pursue this in 2023 as part of a wider review of IT use within HCS.

15 Conclusion

In dealing with SRoL applications, issues have been discovered which impact upon a person's right to respect for one's private and family life, being Article 8 of the European Convention on Human Rights. On the Minister's behalf, and under positive obligation, it is sought to remedy those issues, for example by challenging contact restrictions made in care settings. This is an unforeseen benefit of the CSDL.

There is much work to be done in order to further embed the law and in order to comply with the legislative framework. More still needs to be done to improve professionals' knowledge and understanding of the legislation as well as wider awareness in society. As such, training will continue to reach as far and wide as possible with the available resources.

However, a great deal has been achieved by the introduction of improved oversight, training and by the work of many committed and determined professionals, focused on providing greater protection to our island's more vulnerable population.