

STATES OF JERSEY



DRAFT CAPACITY AND SELF- DETERMINATION (JERSEY) LAW 201-

Lodged au Greffe on 2nd August 2016
by the Minister for Health and Social Services

STATES GREFFE



Jersey

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European Convention on Human Rights

In accordance with the provisions of Article 16 of the Human Rights (Jersey) Law 2000, the Minister for Health and Social Services has made the following statement –

In the view of the Minister for Health and Social Services, the provisions of the Draft Capacity and Self-Determination (Jersey) Law 201- are compatible with the Convention Rights.

Signed: **Senator A.K.F. Green, M.B.E.**

Minister for Health and Social Services

Dated: 29th July 2016

REPORT

The significance of capacity to make decisions

1. Capacity issues potentially affect everyone. A person's capacity to make some decisions may be impaired for a variety of reasons, such as having significant learning difficulties or mental health problems, suffering a stroke or head injuries, or the onset of dementia.
2. The Health and Social Services Department ("HSSD") is pleased to present this proposition to enact the Draft Capacity and Self-Determination Law (the "draft Law"). The purpose of the draft Law will be to safeguard the dignity and wellbeing of people who may not have the capacity to make decisions for themselves, and enable them to make their own decisions wherever possible. It will also ensure that where a person lacks the capacity to make a decision, there are appropriate persons and procedures in place to support that person and ensure a decision is made in that person's best interests.
3. In some respects these proposals are related to the proposition to enact a new Mental Health Law for Jersey (the "**new Mental Health Law**"), which is why these propositions have been brought forward at the same time. However, the provisions of this draft Law are of potentially even greater significance to the population of Jersey.
4. The proposals draw inspiration from the Mental Capacity Act 2005 ("**the 2005 Act**"), and build on applicable policies and principles of customary law that are relevant to many of the legislative proposals. However, in many respects the draft Law breaks new ground in Jersey.
5. This report discusses the policy background and the rationale for bringing forward this hugely significant draft Law.

Why do we need a new Capacity and Self-Determination Law?

6. Capacity issues potentially affect everyone. A person's capacity to make some decisions may be impaired for a variety of reasons, such as having significant learning difficulties or mental health problems, suffering a stroke or head injuries, or the onset of dementia.
7. It is essential that the provision of services for people who may lose capacity to make decisions for themselves is underpinned with a modern and clear legal framework which safeguards the rights, dignity and wellbeing of people who may have lost the capacity to make a decision for themselves, and provides assurance that the person will be supported to make a decision for themselves wherever possible, and will have decisions made in the person's best interests where it is not.
8. The draft Law enables a person to identify another person or persons who can make certain decisions for them if they lose capacity to do so. The draft Law also provides a legal basis for people to make advance decisions about consent to care or treatment in the event that they may lose capacity. This ensures that Jersey's capacity legislation is compatible with modern standards in clinical practice, and provides certainty for clinicians treating people who may not have capacity to consent to treatment.
9. It is intended that the new legal framework should apply to *any* decision affecting a person who may not have capacity. So the draft Law may apply to decisions about how a person will be cared for, and the medical treatment they

will receive. It will also apply to day-to-day decisions about how people live their lives and manage their finances. It will ensure that the protections in the new Law are applied to all decisions affecting a person's life.

10. The draft Law introduces a process for authorising the provision of care to persons who lack the capacity to consent, and where their care needs to be provided in circumstances that, by necessity, amount to a deprivation of liberty. Following decisions of the European Court of Human Rights in Strasbourg and the UK Supreme Court, the draft Law ensures that a person who lacks capacity will be cared for in circumstances that do not amount to a breach of their human rights. Careful consideration has been given to putting in place appropriate safeguards to limit deprivations of liberty and ensure they are properly authorised and capable of being challenged. These safeguards are proportionate and have been made as simple as possible for care professionals, service-users, their carers and advocates, and the courts to understand and apply in practice.

How has the new Capacity and Self-Determination Law been developed?

11. The Council of Ministers agreed in April 2014 that a project should be commenced to not only replace the Mental Health Law 1969 (the "1969 Law") with a new Mental Health Law, but also to simultaneously develop a new piece of legislation to enable people to plan for a time when they may lose capacity to make decisions for themselves and ensure that, when a person loses capacity to make a decision, they are supported to continue to make decisions and determine their future to the fullest extent possible. The ambitious objective of this project was to consult widely on the content of these Laws, have them drafted, and then implement them by April 2018.
12. To fulfil this objective, a Project Team composed of officials in the Health and Social Services Department ("HSSD"), Law Officers' Department, Law Draftsman's Office and Chief Minister's Department was established.
13. The project team conducted a consultation process and the iterative development of the new Mental Health Law and Capacity and Self-Determination Law in several phases. The consultation process culminated in a public consultation on a new Draft Mental Health (Jersey) Law 201- and a Draft Capacity and Self-Determination (Jersey) Law 201- in the second half of 2015.
14. The level of participation and commitment shown by the Public and stakeholders in these consultation exercises, both by attendance at consultation events and the making of timely, considered and helpful written submissions, has been exceptional. The people who gave of their time included private individuals and carers, and representatives from voluntary and community sector organisations; front-line health and social services staff; the States of Jersey Police; H.M.P. La Moye; the judiciary (both from the criminal courts and Mental Health Review Tribunal); the Judicial Greffe; the Viscount's Department; the Law Society and the Safeguarding Partnership Board. The consultation exercises also received submissions from a range of professionals, including a number of legal professionals providing curatorship services.
15. The hard work and dedication of all those organisations and individuals who participated in the consultation processes was essential to the progress of this project. *Mind Jersey*, which provides essential independent advocacy services for people who experience mental illness, drew on their experience and

expertise, as well as further professional support, to provide detailed and helpful feedback on both draft Laws and ensure that their clients' interests were represented in the consultation process.

16. As the detailed consultation response reflects, the Project Team has given careful consideration to the consultation responses, including those submitted in the recent public consultation in settling the provisions in the draft Laws.

Summary of this draft Law

17. The purpose of the draft Law is to provide a legal framework for assessing whether a person has capacity to make a decision if they are supported to do so. In this respect, the draft Law promote supported decision-making by the person affected over decision-making by family members, carers and other professionals.
18. However, if a person does not have capacity to make a decision with support, then the draft Law provides a number of processes to ensure that any decision made for the person is made by an appropriate person and in the person's best interests.
19. The draft Law will enable a person to identify another person or persons who can make certain decisions for them if they lose capacity to do so. The draft Law also provides a legal basis for people to make advance decisions about consent to care or treatment in the event that they may lose capacity. Doing so would be compatible with modern standards in clinical practice, and would provide certainty for clinicians treating people who may not have capacity to consent to treatment when that treatment needs to be given.
20. The draft Law applies to *any* decision affecting a person who may not have capacity. So the draft Law may be applied to decisions about how a person will be cared for and the medical treatment they will receive. It will also apply to day-to-day decisions about how people live their lives and manage their finances. It will be important to ensure that the protections in the draft Law are applied to all decisions affecting a person's life.
21. Where the processes in the draft Law are followed it provides protection, not only for individuals who may lack capacity, but also legal protection for those who may need to make decisions in the best interests of such persons. Awareness and understanding of the draft Law among service-users, service-providers and professionals, in all walks of life, will be vital.
22. Part 5 of the draft Law creates a process for authorising the provision of care to persons who lack the capacity to consent and where their care needs to be provided in circumstances that, by necessity, include significant restrictions on the person's liberty. Following decisions of the European Court of Human Rights in Strasbourg¹ and the UK Supreme Court² this new procedure, which includes a number of safeguards for authorising significant restrictions on a person's liberty, will help to ensure that the human rights of vulnerable people will be respected.
23. The new process in Part 5 will ensure that significant restrictions on a person's liberty are justified, proportionate and capable of being challenged. However, the procedures have also been designed, so far as practicable, to be simple for care professionals, the courts, service-users and their advocates to understand and apply in practice. In this way we hope to build on the UK's

¹ In particular *HL v UK* 45508/99 (2004) ECHR 471, often referred to as the Bournemouth Case.

² *Surrey County Council v P and Others* [2014] UKSC 19.

experience of operating the Deprivation of Liberty provisions in the Mental Capacity Act 2005³, which has similar objectives, but the complexity of which has led to a number of challenges in its implementation.

Key provisions in the draft Law

24. A detailed account of the effects of each Part of the draft Law is set out in the Law Draftsman's Explanatory Note, and the human rights notes provided by the Law Officers' Department set out a detailed account of the human rights issues raised and addressed by the draft Law. The purpose of this part of the report is then to explain the reasons for adopting the approach reflected in some key provisions of the draft Law.
25. In a number of places in the draft Law and in this Report the shorthand "P" has been used to refer to a person who has or who may have lost capacity in relation to one or more matters, and in relation to whom decisions or action may or should be taken pursuant to the new Law. In places, shorthand is also used to refer to a person doing something in respect of P pursuant to the law. The meaning of this shorthand is explained in appropriate places below.

The principles

26. The draft Law should, above all things, empower people to make decisions for themselves wherever possible. A simple collection of guiding principles underlie the operation of this draft Law, as it does the 2005 Act⁴ and The Safeguarding Partnership Boards *Multi-Agency Capacity Policy and procedures (Jersey), December 2015*. It is considered appropriate to incorporate these principles into the body of the new Law, rather than placing them in secondary legislation or even a code of practice, because the application of these principles is integral to the operation of several provisions of the draft Law.
27. Article 3 of the draft Law sets out the following principles which are to be employed when applying the draft Law –
 - (a) A person must be assumed to have capacity unless it is established that he lacks capacity.
 - (b) A person is not to be treated as unable to make a decision unless all practicable steps to help him to make the decision have been taken without success.
 - (c) A person is not to be treated as unable to make a decision merely because he makes an unwise decision.
 - (d) An act done or decision made, under the new Law for or on behalf of a person who lacks capacity must be done, or made, in his best interests.
 - (e) Before the act is done, or the decision is made, regard must be had to whether the purpose for which it is needed can be as effectively achieved in a way that is less restrictive of the person's rights and freedom.

³ The House of Lords Select Committee on the Mental Capacity Act 2005 has recently released its report of pre-legislative scrutiny on that Act and highlights a number of difficulties with respect to its implementation. HL Paper 139, 13th March 2014.

⁴ See section 1 of the 2005 Act.

Determining whether someone has capacity

28. In many situations, individuals providing services (whether they be care professionals, financial advisers or others) may be involved with persons who they think may lack capacity to make a particular decision for themselves. These decisions may range from day-to-day actions or decisions about what to wear, to life-and-death decisions about health care, to important decisions about managing money.
29. The safeguarding Partnership Board has recently put in place its own Multi-Agency Mental Capacity Policy and Procedures (“**the Policy**”) which has been adopted by all member organisations. The Policy sets out the method of assessing a person’s capacity to make a decision and the making of best interests’ decisions. The Policy reflects principles established in common law in England and Wales and codified in the 2005 Act. Those principles have in most respects already been incorporated into the customary law in Jersey⁵.
30. Part 1 of the draft Law will build on the Policy and customary law, by providing clear statutory framework to guide people who may, from time to time, be required to make a decision on behalf of the person if they don’t have capacity. Most of the provisions of Part 1 apply, regardless of the nature of the decision that may need to be taken by, or on behalf of a person. Part 1 will therefore be used by carers and health and social care staff who are directly involved in providing social care to a person, by medical practitioners proposing a course of the treatment and also, for example, by a financial institution that is managing a person’s assets.
31. Articles 4 and 5 of the draft Law set out a simple test to be applied when assessing a person’s capacity to make a particular decision. The test is ‘decision-specific’ and ‘time-specific’, so that a person may have capacity to make a particular decision on a particular day about an aspect of his care and welfare, but may not have capacity to make a decision on that day about an aspect of his financial affairs.
32. Under this test no-one should be labelled ‘incapable’ or ‘incapacitated’ as a result of a particular medical condition or diagnosis, whether it is permanent or temporary. Lack of capacity cannot be established merely by reference to a person’s age, appearance, or any condition or aspect of a person’s behaviour, which may lead others to make assumptions about capacity.
33. Moreover, the foundation for the new Law is that it should be assumed that persons aged 16 or over have capacity to make decisions for themselves. No person under the age of 16 shall be subject to the new Law, and it will not affect the law in respect of consent to medical treatment or other matters in respect of children under that age.
34. Article 4(1) provides that for the purposes of the draft Law, a person lacks capacity in relation to a matter if –
 - (a) he has an impairment of, or a disturbance in the functioning of, the mind or brain (whether permanent or temporary); and
 - (b) there is evidence that the person is unable to make the particular decision at the time the decision needs to be made.

⁵ In particular, see paragraph 19 of the judgment in *Attorney General v X* [2004] 1 JLR, which sets out the same test for assessing capacity as is contained in the policy and in the Mental Capacity Act 2005, which is in turn based on a wealth of English case law including the decisions in *Re T* [1992] 2 FLR 458 and *Re MB* (Medical Treatment) [1997] 2 F.C.R. 541.

35. Article 5(1) provides that under the draft Law, a person is unable to make a decision for himself if he is unable –
- (a) to understand the information relevant to the decision;
 - (b) to retain that information;
 - (c) to use or weigh that information as part of the process of making the decision; or
 - (d) to communicate his decision (whether by talking, using sign language or any other means).
36. The principles set out in Article 3 of the draft Law will apply when determining whether a person is able to make a decision. So a person is not to be regarded as unable to do any of the things mentioned in Article 5(1) unless all practicable steps have been taken to enable that person to make the decision for themselves. For example, before deciding that a person is unable to understand information relevant to the decision, the person should be given the relevant information in a way that is appropriate to his circumstances (using simple language, visual aids or any other means). Also, evidence that the person may make an unwise decision will not, of itself, be evidence that the person lacks capacity to make the particular decision.

Best interests

37. If a person does not have capacity to make a particular decision, then before the act is done, or a decision is made on their behalf, the person who proposes to make the decision should establish what is in the person's best interests and act accordingly.
38. Article 6 of the draft Law sets out the particular matters that must be considered or disregarded by a person who proposes to make a decision in the best interests of a person. The person making the decision must not make it merely on the basis of the person's age or appearance or condition or behaviour, but should consider all the relevant circumstances and, where it is reasonably practicable to do so, encourage the person to participate as fully as possible in the decision-making process.
39. Article 6 provides that the best interests of a person should be determined with consideration, in particular, to –
- (a) whether it is likely that the person will at some time have capacity in relation to the matter in question, and, if it appears likely that he will, when that is likely to be;
 - (b) the person's past and present wishes and feelings, which may include any relevant written statements made before he lost capacity;
 - (c) the beliefs and values that would be likely to influence his or her decision; and
 - (d) other factors that he or she would be likely to consider if he were able to do so.
40. The new Law should also provide that a person proposing to make a decision on behalf of someone else must, if it is practicable and appropriate to consult them, take into account the views of the following persons as to what would be in the person's best interests –
- (a) anyone named by the person as someone to be consulted on the matter in question or on matters of that kind;

- (b) anyone engaged in caring for the person or interested in his welfare;
- (c) anyone who has had a lasting power of attorney granted to them which applies to the decision in question; or
- (d) any delegate or other person appointed by the Royal Court to handle his affairs (see further below).

Excluded Decisions

41. Some types of decisions should never be made by another person or a court, on behalf of another person who lacks capacity. This is because these decisions or actions are either so personal to the individual or because other laws govern them. Article 7 of the draft Law specifies the nature of such matters, which will include decisions relating to marriage or civil partnership, divorce, sexual relationships and voting. In addition, they will include decisions that may be made about treatment for mental disorder where someone is being detained and treated under the proposed provisions of the new Mental Health Law.

Acts in connection with care or treatment

42. As well as protecting the rights of a person who may lack capacity, Article 8 of the draft Law will provide people making decisions about a person’s care or treatment with greater legal protection if –

- (a) they have taken reasonable steps to establish whether a person has capacity and reasonably believes that they don’t; and
- (b) they reasonably believe that a particular course of action is in the person’s best interests.

43. Where the person making a decision on a person’s behalf has complied with the Law with respect to assessing capacity and best interests, then they will incur no liability for their action by virtue of the lack of consent to them. They may still be liable in the normal way for loss or damage for negligence in the way that they do the act. This could cover actions that might otherwise attract criminal prosecution or civil liability if someone has to interfere with the person’s body or property in the course of providing care or treatment to a person lacking capacity.

44. Article 8 does not affect the operation of provisions relating to advance decisions to refuse treatment (discussed below). So an applicable advance decision to refuse treatment must be respected notwithstanding that it might be considered to be in their best interests for treatment to be administered, and the protection from liability here will not apply to those persons who perform an act in violation of a person’s advance decision to refuse treatment.

45. Article 8 is also limited by Article 9 of the draft Law, which provides that the exclusion of civil and criminal liability referred to above cannot be relied on in relation to acts of restraint unless the person applying the restraint reasonably believes it is necessary to restrain P to prevent harm to P, the act is a proportionate response to the likelihood of P suffering harm and the seriousness of the harm.

Planning for the future

46. The importance of self-determination under the draft Law is reflected in the provisions made to ensure that everyone who now has capacity can plan for a time when they may lose capacity.

47. Under the draft Law, this planning may take 2 forms –
- (a) A Lasting Power of Attorney (“**LPA**”) can be made under Part 2 of the draft Law to determine who is entitled to make certain types of decisions for a person, including in the event that he or she loses capacity.
 - (b) An Advance Decision to Refuse Treatment (“**ADRT**”) can be made under Part 3 where a person with capacity does not want to receive particular treatment in the future in the event that they lose capacity.
48. These proposals are described in further detail below. They are closely related to the proposals regarding the making of decisions and appointment of delegates by the Royal Court.

Lasting Powers of Attorney (LPAs)

49. Part 2 of the draft Law will allow a person (the ‘donor’) who is 18 years of age or older to appoint another person (an ‘attorney’) to make decisions on the donor’s behalf. In order to make a valid LPA, the donor would need to have capacity to make the decision to appoint an attorney when they complete the form to appoint the attorney.
50. An attorney will have power to make decisions on behalf of the individual in their best interests. HSSD proposes that there should be 2 types of LPA, and that a person may choose to make either or both types, and may appoint a different person or persons as an attorney in each case. The 2 types of LPA will be –
- (a) health and welfare; and
 - (b) property and affairs.
51. A health and welfare LPA will allow the attorney to make decisions about things like the donor’s daily routine (e.g. eating and what to wear), medical care, moving into a care home and life-sustaining treatment. This type of LPA wouldn’t have any practical effect until such time as the donor loses capacity to make his or her own decisions.
52. A property and affairs LPA will allow the attorney to make decisions about the donor’s property and financial affairs, such as paying bills, collecting benefits and selling assets. This type of LPA could potentially be used while the donor still has capacity, if permission is given in the LPA for that to happen.
53. An attorney may be appointed to act alone, or may be appointed so that they must act jointly with another attorney or attorneys (i.e. they must all join together in any decision). A person may also appoint more than one person as attorney, but allow each of them to act separately (i.e. they can act either independently or all together, which may be appropriate where the person is unsure which of his or her attorneys will be available to act at a given time). The donor should also be able to stipulate that there are some matters in respect of which an attorney must act jointly and others where they may act alone.
54. As the exercise of an LPA could have significant effects, there need to be appropriate safeguards placed on the creation of LPAs. At the same time, it is important not to make these too burdensome or expensive, as this may put people off making LPAs.

55. The 2005 Act contains provisions relating to lasting powers of attorney at sections 9–14. In practice, an application in the UK for an LPA needs to be witnessed and, once the LPA has been completed, an application needs to be made to the Office of the Public Guardian, a statutory public body, to register the LPA. In the UK it costs £110 to register a LPA and £220 if a person wishes to register both a health and welfare LPA and property and affairs LPA. Further, as the forms used to appoint an attorney and register the LPA are complex, it is often the case that a person will need the assistance of a legal professional in order to complete the process. There is evidence that in the UK the complexity and expense of registering an LPA has had a negative impact on the number of people using them⁶.
56. As far as it is possible to do so, the draft Law and subordinate legislation that may be made under it will seek to streamline the process for making an LPA in comparison with that in the UK, and make it sufficiently simple that it can be completed by most people without the necessity for legal advice. However, it is also important that there is sufficient formality to ensure appropriate safeguards are put in place.
57. Part 2 of the draft Law requires that any LPA must be set out in the form prescribed by the Minister by Order and registered by the Judicial Greffe, in accordance with the requirements set out in the Schedule to the draft Law, before it can come into effect. The LPA may be registered by either the donor or attorney, but the requirement to register the LPA affords an important opportunity to challenge or resolve disputes about the terms of an LPA, and may save time and expense in the long term. Proof of registration of an LPA will also provide certainty to those who may transact with an attorney on a donor's behalf. The administration costs to the Judicial Greffe may be passed on to those making LPAs by making it a requirement that the application be accompanied by a fee. The level of this fee will be prescribed by the Minister by Order.
58. It is intended that the form for appointing an LPA will be simplified, in comparison to that which is utilised under the 2005 Act. It is proposed that a short form (possibly no longer than 2 sides of A4 paper) will be required for the appointment of an LPA, and that form will be accompanied by a guidance booklet which will contain much of the information required to complete the form. Execution of the form will require the signatures of the donor and potential attorney(s) and those signatures will need to be witnessed. The person who witnesses the donor's signature must confirm that, in the witness's opinion, the donor understands the purpose of the LPA and the authority they are conferring and is not subject to undue pressure.
59. At present it is not possible to make a LPA if you are a Jersey resident. However, an Enduring Power of Attorney (the precursor to an LPA) or LPA made by a UK resident can be exercised in relation to assets in Jersey, provided it is registered by the Samedi Section of the Judicial Greffe. Regulation made under the draft Law may make further provision for the purpose of recognising UK LPAs in Jersey, and further work will be undertaken to ensure that an LPA validly made in Jersey is fully recognised in respect of assets in the UK.

⁶ House of Lords Select Committee: Report of post legislative scrutiny of the Mental Capacity Act 2005.

60. It is important to note that a health and welfare LPA will not authorise the giving or refusing of consent to life-sustaining treatment, unless the instrument contains express provisions to that effect. Further, the donor may place conditions or restrictions to the exercise of authority by an attorney and may, at any time when he has the capacity to do so, revoke the power.
61. Articles 19 and 20 of the draft Law give the Royal Court jurisdiction to determine the validity of lasting powers of attorney, including any question relating to whether the requirements for the creation of a LPA have been met, and whether the power has been revoked or has otherwise come to an end. The Royal Court may also direct that an LPA may not be registered, or that one that has been registered should be revoked, if the Royal Court is satisfied that fraud or undue pressure was used to induce any person to execute a LPA, or if an attorney has behaved, is behaving or is proposing to behave, in a way that contravenes his authority or is not or would not be in P's best interests.
62. The Royal Court also has the power to determine any question as to the meaning or effect of a LPA and to give directions with respect to decisions which the attorney or attorneys (if more than one) have authority to make, and which the Donor lacks capacity to make.

Advance decisions to refuse treatment (ADRTs)

63. Part 3 of the draft Law provides that a person who is 16 years of age or older may make a decision in advance to refuse treatment (an “ADRT”) if they should lose capacity to give or refuse consent in the future. The effect of a valid ADRT should be the same as a decision that is made by a person with capacity to refuse treatment, so medical professionals will be required to act in accordance with it.
64. The making of advance statements, whereby a person with capacity provides instructions about what is to be done if they subsequently lose capacity to make a decision or to communicate, is not new. The British Medical Association has recognised the importance of advance statements, which are known variously as Living Wills, Advance Directives or ADRTs for some time⁷. Further, the validity of decisions taken in accordance with an ADRT has been recognised by the Royal Court⁸ in the past, and is reflected in an HSSD policy on this issue⁹. So, the purpose of these provisions of the draft

⁷ The authority for these statements is derived from “*the established legal right of competent, informed adults to refuse treatment, irrespective of the wisdom of their judgement*” (BMA, 1995). Following a valid and applicable ADRT is the same as acting on the instructions of a capacitated individual. The best interests principle does not therefore apply to such decisions and healthcare professionals must comply with a valid and applicable advance decision, even if they do not consider that it would be in the Service User’s best interests to do so.

⁸ In the case of *Attorney General v X* Ibid, the Royal Court upheld an advance directive by a prisoner which refused nutrition, hydration or medical treatment. In doing so, the Court was endorsing the approach that had previously been taken to as to the right of a person to refuse consent to medical treatment in the case of *In the Matter of an Infant* 1995 JLR 296 (see paragraph 25). In *Attorney General v X*, at paragraph 15, the then Deputy Bailiff confirmed the law in Jersey: “*We are in no doubt that we should adopt the principles described in the [English] cases to which we have referred as accurately reflecting the law of Jersey. Accordingly, a mentally competent adult with full capacity has an absolute right to refuse to consent to medical treatment or to take food and drink for any reason, or for no reason at all, even where the decision may lead to his or her death.*”

⁹ HSSD has an Advance Directives Policy in place at present that contains further information on this subject.

Law would put the effect of such decisions and the method of making them on a statutory footing that is clear and accessible to the Public.

65. The person who wishes their ADRT to be followed who will be responsible for bringing the decision to the notice of services likely to be involved in their care in the future. Where an ADRT is brought to the attention of HSSD, steps will be taken to log the advance decision and ensure, where practicable, that it is brought to the attention of front-line care teams.
66. HSSD proposes that, in most cases, there shouldn't be any particular formalities required to make an ADRT and that it should be possible to withdraw an ADRT without any formality. Further, the ADRT should not apply until the person loses capacity to consent to treatment (so it has no effect while the person retains capacity). In order to be effective, the ADRT must be specific about the treatment that it applies to and any preconditions placed on it should be satisfied.
67. However, Article 22(5) provides that where an ADRT concerns treatment that is necessary to sustain life, some formalities must be complied with in order for the advance decision to be applicable. These formalities are that the decision must be in writing, signed and witnessed. In addition, there must be an express statement that the decision stands "even if P's life is at risk". Life sustaining treatment means treatment, which in the view of the person providing healthcare for the person concerned is necessary to sustain life.
68. Article 23(3) of the draft Law provides that a medical professional is not liable for the consequences of withholding or withdrawing a treatment from P if they reasonably believe that an advance decision has been made that is valid and applicable to that treatment.

Powers of the Royal Court and appointment of delegates

69. The intention is that as many people in Jersey as possible should be encouraged to make LPAs. However, there will be situations in which a person loses capacity to make a decision for themselves and has not appointed an attorney to make a decision for them, whether about their care and treatment or property and affairs.
70. At present the 1969 Law makes some provision as to how the affairs of such persons may be handled. It provides for persons, subject to meeting certain tests, to be received into guardianship for the purpose of making some decisions about welfare matters or to have a curator appointed to manage a person's financial affairs. However, there are limitations in respect of both guardianship and curatorship which cause difficulties in practice.
71. As set out in the Draft Mental Health Law, it is proposed that guardianship should be retained for use, principally, in respect of those patients who have capacity but require some support to protect their welfare while they continue to live in the community. While some minor amendments and enhancements have been sought to these powers in those instructions, the powers of the guardian will remain limited to reflect their purpose.
72. The current curatorship provisions in the 1969 Law allow a person appointed by the Royal Court (the curator) to manage the financial affairs of a person (the interdict). However, these provisions have a number of limitations and are difficult to apply in practice. In some respects they are too restrictive and inflexible to allow the curator to properly deal with an interdict's assets. For example, Article 43(17)(a) of the 1969 Law requires a curator to apply to the

Court when it appears necessary or expedient to arrange for or authorise the sale, exchange, charging or other disposition of, or dealing with, any property of the interdict. Such an application is then examined by 2 Jurats, who decide whether the action is necessary or expedient. Arguably this regime is too cumbersome and restrictive, particularly where the curator is the interdict's spouse or civil partner. Further, the provisions at present require the Attorney General to make an application to the court for the appointment of a curator, even where there are few or no substantial assets to manage. Also, there is currently insufficient control on the fees that may be charged by curators, or sufficient powers or resources devoted to the examination of accounts filed by curators.

73. There have also been difficulties in persuading lawyers to undertake curatorship, especially when the interdict has little in the way of assets and it is unlikely that they will be able to recover fees for this work, as legal aid is generally only provided where litigation is pursued by the curator. The Viscount's Department currently provides a service as curator of last resort, but the resources for this work are limited.
74. Aside from the powers under the 1969 Law, it is important to recognise that the Royal Court also has non-statutory powers to make decisions on behalf of a person who lacks the capacity to make a decision for him or herself. These powers form part of the 'inherent jurisdiction' of the Royal Court, and while best interests decision-making is in general a matter for doctors, where the decision is of sufficient gravity, the Royal Court can intervene as a safeguard and grant a declaration as to a person's capacity and best interests¹⁰.
75. The new Mental Health Law will repeal and not replace the provision of the 1969 Law with respect to curatorship. In place of this system, the draft Law will codify and supplement the inherent jurisdiction of the Royal Court, by giving it express powers to make decisions on behalf of persons who lack capacity to make decisions for themselves. The Royal Court is also given the power to appoint a person (referred to below as "a delegate") to make certain decisions on a person's behalf where the Royal Court cannot make a one-off decision to resolve the issues. The provision for the Royal Court or a delegate to make decisions on behalf of a person would replace the provisions for curatorship and would provide an alternative to the receipt of a person into guardianship, particularly where the person does not have capacity to make decisions about welfare matters for him or herself.
76. Similarly to LPAs, the draft Law provides that delegates may be appointed to make decisions on either the health and welfare or the property and affairs of a person, or both. The extent of a delegate's authority would be determined by the Royal Court, and could be limited to particular decisions or by reference to a particular period of time.
77. The appointment of a delegate by the Royal Court should not limit the jurisdiction of the Royal Court to consider any matter relating to a person who lacks capacity, and the Royal Court will still be able to make declarations, decisions and orders affecting people who lack capacity. The Royal Court will

¹⁰ *Attorney General v X* [2004] JLR 1. In that case, the Attorney General sought a declaration that the prison and hospital could lawfully respect a prisoner's decision, captured in an advance directive and after a clinical assessment confirmed he had capacity, to refuse sustenance and abstain from treating him without infringing the State's obligation to respect the sanctity of life under Article 2 of the European Convention of Human Rights.

need to be involved in complex or disputed cases, for example, where it is unclear whether someone lacks capacity or what is in their best interests and the decision is significant.

78. The draft Law provides the Royal Court with the power to make a declaration or order, or give a direction or make an appointment on such terms as it considers are in P's best interests, even though no application is before the court for an order, directions or an appointment on those terms.
79. Part 4 of the draft Law makes provision setting out a non-exhaustive lists of the health and welfare matters, and property and affairs matters that the Royal Court, or a person appointed as a delegate should be able to make decisions about. Article 36 of the draft Law further provides that a delegate may do such things as are necessary or expedient to be done in P's best interests, subject to any conditions and restrictions that are placed on the authority of the delegate by the Court. Article 24(3) of the draft Law requires the Royal Court to consider what powers it is appropriate for a delegate to have in the circumstances, and to limit the scope and duration of the appointment to that which is reasonably necessary for the purpose.
80. Part 4 makes further specific provision in respect of the powers of the Royal Court to make decision in respect of wills, trusts and some other property and affairs matters.
81. The draft Law is intended to keep the process of applying to the Royal Court for the appointment of a delegate as simple as possible. Appropriate procedural safeguards will also need to be put in place, including the provision of legal advice and an Independent Capacity Support Worker (see below) for the person in respect of whom a delegate may be appointed. Where a person has capacity the Royal Court should not be asked to appoint a delegate, placing the emphasis on individuals with capacity to make a LPA instead.
82. Appropriate arrangements will need to be put in place for the oversight of delegates and attorneys. The Royal Court and the Judicial Greffe may be involved in appointing delegates and registering attorneys and in dealing with disputes, but it may not be appropriate to involve them in the supervision of the day-to-day management of a person's affairs or investigating concerns raised about the way in which an attorney is operating. The Viscount could perhaps carry out work in this regard, together with other agencies, such as the Police and social services, and further discussions are taking place with a view to putting appropriate provision in place. Article 36 of the draft Law contains powers for the States, by Regulations, to make provision to confer appropriate regulatory powers on a public authority for the purpose of their supervising and regulating attorneys and delegates.

Placing significant restrictions on people who lack capacity

83. In some cases, where a vulnerable person cannot consent to the arrangements for their care or treatment, it is important that there are appropriate powers for those caring for them to be able to restrict their liberty or movement in order to prevent them coming to harm.
84. In order to protect the vulnerable person's human rights, it is important that significant restrictions are only imposed pursuant to a legal procedure that protects against arbitrary interference with their liberty and private life, and that affords them the opportunity to challenge the imposition of these restrictions in an independent and impartial tribunal. Further details of the

human rights issues in this regard are set out in the human rights notes prepared by the Law Officers and included as the Appendix to this Report.

85. While some vulnerable persons will most appropriately be detained for assessment and treatment under the powers provided in the new Mental Health Law, for other persons, including most of those persons with a learning disability or degenerative condition like dementia, authorised detention in an approved establishment under mental health legislation will neither be the most appropriate, nor the least restrictive approach to their care.
86. In England, special provision was made in the Mental Capacity Act 2005 to insert provision for Deprivation of Liberty Safeguards (“DoLS”)¹¹. DoLS provide legal protection for those people who lose capacity to consent to the arrangement for their care or treatment and who are, or may become, deprived of their liberty by the nature of arrangements that are made in their best interests. Their purpose is to ensure that there is a professional assessment of whether the person concerned lacks the capacity to make his own decision about whether to be accommodated in the hospital or care home for care or treatment, and whether it is necessary in his or her best interests to be deprived of their liberty.
87. However, while DoLS provide a process for protecting patients’ rights, they have been the subject of a great deal of criticism in England¹². In particular, there has been criticism of the complexity of the regime and the limitations on its application, since it does not apply to placements outside hospitals and care homes. There has also been confusion about how the regime should be applied in combination with detention powers in mental health legislation.
88. Therefore, Part 5 of the draft Law contains appropriate alternative statutory safeguards to those found in the new Mental Health Law, to authorise significant restrictions on the liberty of a person who lacks capacity in any environment where they may be provided with health and social care.
89. Part 5 also makes arrangements so that such restrictions as are authorised are kept under review and can be challenged. By doing so, Jersey can ensure that its obligations under the Human Rights (Jersey) Law 2000 and Article 5 of the ECHR are met.
90. The content of Part 5 reflects a careful balance, in line with the feedback from the consultation exercises, between robust procedural safeguards and ensuring the system is straight forward to apply in practice. The aim is to ensure that assessments under Part 5 can be conducted by the same persons who are conducting assessments for social work purposes generally, and under the Long-Term Care (Jersey) Law 2012 in particular. The persons carrying out those assessments will be trained to assess capacity and best interests, and so will be well-equipped to carry out the assessments required under Part 5.
91. Under the Regulation of Care (Jersey) Law 2014, the provider and manager of every establishment providing health and social care will need to be registered by the new Independent Health and Social Care Commission established under that Law. Under Part 5, providers of health and social care services will be required to request an assessment from a registered care professional (who may among other things be a social worker, nurse or doctor) if they think they will need to impose significant restrictions on a person’s liberty in order to

¹¹ In England these are found in the Mental Capacity Act 2005, as amended.

¹² House of Lords Select Committee Report, Chapter 7.

care for them in a way that protects them from harm. The registered care professional will assess whether a person has the capacity to consent to proposals made for their treatment and, if not, whether those arrangements would involve a *significant restriction* on liberty that is necessary and in the best interests of the person.

92. The terminological shift away from referring to deprivations of liberty under DoLS, towards referring to significant restrictions on liberty is an important one. This move is inspired both by difficulties in explaining to practitioners what a deprivation of liberty is¹³ and also by a recent reports of the Scottish and UK Law Commissions¹⁴. Both Commissions recommend that a process should be put in place to authorise any “*significant restriction of liberty*” because, unlike deprivation of liberty, it is a concept that can be defined for that jurisdiction by reference to the ECtHR case law. While the concept of significant restriction would not expressly match the concept of deprivation of liberty, it has been defined in Article 39 of the draft Law in a way that should be clearer to service-users and professionals, and that would capture the types of restrictions that could be said to give rise to a deprivation of liberty, or amount to an interference with the right to private and family life.
93. The assessment conducted by the registered professional under Part 5 must be conducted in accordance with Articles 44 and 45, and must be supported by appropriate medical evidence opinion. This may arise either from the person’s medical records or from an interview with the medical practitioner responsible for the person’s care and treatment. At the conclusion of the assessment, the assessor must prepare a written report setting out their conclusions on the following questions –
- (a) Does P lack capacity with reference to the question whether or not he or she consents to the arrangements for his or her care?
 - (b) With regard to P’s care, is it necessary to impose any significant restrictions on P’s liberty in the interests of P’s¹⁵ health or safety? and
 - (c) Having regard to the general principles and other provisions of the new Law, it is in P’s best interests to be provided with care in circumstances where a significant restriction on his or her liberty will be applied?¹⁶

¹³ A difficulty highlighted with DoLS by the House of Lords Select Committee on the Mental Capacity Act 2005 – <http://www.publications.parliament.uk/pa/ld201314/ldselect/ldmentalcap/139/139.pdf> paragraphs 284 and 285.

¹⁴ Report on Adults with Incapacity, October 2014

http://www.scotlawcom.gov.uk/index.php/download_file/view/1328/138/.

¹⁵ Parallel with the Mental Health Law, but we are not referring to the interests of the health or safety of others or risks to others. We don’t think that is appropriate as a ground for depriving a person without capacity of their liberty. Same position as under a best interests assessment under paragraph 16 of Schedule A1 to the MCA 2005.

¹⁶ This last point reflects the philosophy of the new Law, that restrictions on P’s liberty may be necessary to protect P from harm, but that if they are not in P’s best interests (because they would cause P unnecessary distress) then they should not be imposed. This is in line with the Law in England and Wales, but is potentially a difficult message to get across to professionals who may feel compelled to intervene regardless, where health and safety are at significant risk.

94. The Registered Assessor's report should set out a recommendation as to the nature of any significant restrictions on P's liberty that the Registered Assessor thinks it is necessary to impose.
95. All assessments will be submitted to the Minister, who will be responsible for checking that an application is properly made and, if that is recommended, confirm that the imposition of significant restrictions is authorised. In practice this role might be performed by the Mental Health Administrator, whose role will be provided for in the new Mental Health Law.
96. An authorisation would allow a care provider to impose one or more significant restrictions on someone's liberty for a limited period of time. In general, this would be for a maximum of 12 months with the option to renew the authorisation for further periods of 12 months. This pattern of review has the advantage that it may coincide with the pattern of review for care plans provided for in the Long-Term Care arrangements. Although it would be different to the pattern under the new Mental Health Law, that is justified on the basis that many of the people who would be subject to Part 5 authorisations will have permanent learning disabilities or degenerative illnesses where there is a much lower likelihood of a recovery or change in the person's circumstances in a short period of time.
97. Once an authorisation is in effect, the manager and staff of the care home have authority to impose the significant restrictions on P's liberty, and should suffer no liability for acts done for purpose of maintaining any significant restrictions that the person would not have incurred if P had capacity to consent to the act, and had consented to it. So there is no exclusion or of civil liability for loss or damage, or criminal liability, resulting from negligence. However, the manager who has been given authority to impose a significant restriction on P's liberty must keep the necessity to maintain any restriction(s) under review at all times. If, at any time, the manager considers that it is no longer appropriate to maintain any restriction(s) it should cease to do so.
98. The system for challenging the imposition of authorisations under Part 5 of the draft Law will be similar to that for challenging compulsory detention under the new Mental Health Law. The Mental Health Review Tribunal should be the forum in which a challenge could be heard, because the issues involved in such cases may have a close affinity with the challenges that may be brought concerning detention under the Mental Health Law. There will need to be special rules of procedure for cases under the draft Law compared with the cases under the new Mental Health Law, and this is something that will be given further consideration as part of the implementation process of the draft Law.
99. Similar to Article 12 of the 1969 Law and within the new Mental Health Law, where a person has not already been admitted to any place where authorisation has been given to impose a significant restriction on the person's liberty, then the authorisation (whatever type it might be) should be treated as providing sufficient authority for the Registered Assessor or Manager (see below for further details of these terms), or any person authorised by those persons to take the person and convey him or her to the place where a significant restriction on their liberty may be lawfully imposed at any time within 72 hours of the grant of authorisation.
100. The Minister may, by Order, prescribe the forms that shall be used by all those carrying out assessments or authorisations under these provisions.

101. The Minister may give an urgent authorisation to impose significant restrictions on liberty, where that is necessary in the interests of P's health or safety, allowing the Manager to impose significant restriction or restrictions on P's liberty before an assessment can be completed. The urgent authorisation may last until the assessment is completed and an authorisation is granted, or for no longer than 28 days in total.
102. The Royal Court should have a similar power to authorise the imposition of significant restrictions on P's liberty. So, for example, where the Royal Court determines that P lacks capacity to make a decision about where and how their health and social care is provided, and decides that the person should be cared for in a particular facility and authorise the imposition of significant restrictions on liberty. The Royal Court may only make an order authorising the imposition of a serious restriction on P's liberty where it has received evidence from a medical practitioner and is satisfied that P lacks capacity, and that it is necessary in P's best interests to impose any significant restrictions on his liberty.
103. Once it is in place, authority provided by the Royal Court to impose a significant restriction on liberty should be treated for most purposes in the same way as authority provided by a standard authorisation.

Independent Capacity Advocates

104. Part 6 of the draft Law makes provision so that, in particular where important health and welfare decisions need to be made by, or on behalf of, a person who may lack capacity, that person should have access to an Independent Capacity Advocate ("ICA").
105. The ICA will be someone independent, with knowledge of the law but who is not a lawyer. The ICA will be appointed to support a person who lacks capacity and may be particularly important where the person has no family or friends who are able to represent their wishes and feelings. HSSD anticipates that this role will continue to be funded by HSSD, but provided by a voluntary or community organisation.
106. The ICA will be able to make representations about the person's wishes, feelings, beliefs and values, at the same time as bringing to the attention of the decision-maker all factors that are relevant to the decision. Detailed provision about the role of the ICA may be made by the States Assembly, by Regulations, including with regard to the circumstances where they may be appointed and the roles they may perform. Articles 51, 64 and 65 of the draft Law make provision about circumstances where the Minister must appoint an ICA to support a person in relation to decisions about the imposition of significant restrictions on the person's liberty, serious medical treatment, or the provision of accommodation.

Codes of Practice

107. There will be a statutory code of practice to accompany the draft Law, providing guidance to all those working with and/or caring for persons who lack capacity, including family members, professionals and carers. Codes may, in particular, provide guidance about the circumstances that may amount to a deprivation of liberty.
108. The draft Law provides that it is the duty of a person to have regard to any relevant code if he is acting in relation to a person who lacks capacity under the draft Law.

Ill treatment or wilful neglect

109. There have been a number of cases in the UK¹⁷ and also in Jersey¹⁸ where the neglect and abuse¹⁹ of vulnerable persons has caused them harm. A care worker who mistreats or abuses a person they are caring for might potentially also be prosecuted for other offences against the person, such as assault. However, it may not always be straight forward to prosecute such offences, especially where the person is not capable of consenting to the manner of their treatment.
110. The Regulation of Care (Jersey) Law 2014 will enable the States to create a regulatory framework for health and social care that places responsibility for the quality of care (and criminal liability) on the managers and providers of regulated health and social care activities. Criminal liability may arise from their failure to comply with conditions of registration or from the failure to comply with other requirements by virtue of Articles 13 and 14(1) and (6) of that Law. However, it is only the registered provider (i.e. the owner) and manager who are responsible for institutional failures of this nature and liable to prosecution. That Law does not contain new offences for care workers themselves, so they would continue to be prosecuted under the existing general criminal law and, potentially under the 1969 Law where that applies.
111. With this in mind, Article 67 of the draft Law creates a new, freestanding offence to cover wilful neglect and abuse, that applies to the treatment of people in care homes, or provided with domiciliary care or supported living arrangements.
112. An offence of this nature is provided in section 44 of the 2005 Act. However, as the UK Government has noted²⁰, there is a potential shortcoming in respect of the section 44 offence, which is that it only applies to a person who has care of a person who lacks capacity or other persons with a specified responsibility for the person who lacks capacity. This means that 2 vulnerable service-users, one of whom has capacity and one of whom doesn't, who may experience the same acts of ill-treatment or wilful neglect, may not equally be victims with respect to those acts.
113. Rather than creating a parallel offence to that in section 44 of the 2005 Act, HSSD proposes to create an offence that would be equally applicable to service-users being cared for by regulated health and social care services, which in the short term will cover all regulated care homes and domiciliary care businesses, and in the long term will also cover primary care services like the hospital. The offence should apply both to those who care for persons with

¹⁷ A high profile example from the United Kingdom was the *Winterbourne View* case, involving abuse and neglect in a residential care home.

¹⁸ *AG v Breen* [2011] JRC057

¹⁹ The term 'abuse' can be subject to wide interpretation. For the purpose of the existing Safeguarding Adults Policy and Procedures, the term covers a violation of an individual's human and civil rights by any other person or persons which results in significant harm (DH, 2000). In essence, abuse is the misuse of power and control that one person has over another. Where there is dependency, there is a possibility of abuse or neglect unless adequate safeguards are put in place; and abuse can take place in the person's own home as well as in residential care.

²⁰ The Government published a consultation paper in February 2014, on the creation of a new criminal offence of ill-treatment or wilful neglect.

mental capacity and without mental capacity, but should also apply to persons who have specified responsibilities in relation to a person who lacks capacity.

114. For the purposes of this offence, a person should be treated as having the care of P²¹ if they are responsible giving any health or social care to P as part of an activity that is a regulated activity for the purposes of the Regulation of Care (Jersey) Law 2014. For the avoidance of doubt, it is then intended to capture anyone within the scope of the offence who is employed by a business providing regulated health and social care to P. It is not intended that the new offence should capture family members or neighbours who, whilst they might also neglect or ill-treat P, would not be providing regulated services unless they do so for commercial consideration. To do otherwise might dissuade people from volunteering to care for others. The application of the new offence should then expand and contract with changes to the extent of regulated activities over time.
115. Article 67(3) of the draft Law provides that a person guilty of an offence under this section is liable to imprisonment for a term not exceeding 5 years or a fine or both.

Code of practice

116. The new Law will ensure that the Minister for Health and Social Services will publish a Code of Practice to be followed by all staff regarding the use of the Capacity and Self-Determination Law.

Financial and manpower implications

The financial and manpower implications of the Draft Mental Health (Jersey) Law 201- and the Draft Capacity and Self-Determination (Jersey) Law 201- are closely related and have been assessed together. The financial and manpower implications of approving both pieces of legislation will be 6 full-time equivalents, being 4 in the Judicial Greffe, one in the Law Officers' Department, and one in the Health and Social Services Department, at a total cost of approximately £1,166,000 over 2016, 2017 and 2018. These staff will be responsible for the preparatory work to enable this legislation to be developed to the point where it can be brought into force. Funding for this expenditure will be from existing budgets and the proposed funding included in the MTFP Addition.

Bringing both pieces of legislation into full force as described in the report, via Appointed Day Acts, will have further financial and manpower implications. Of those implications, a sum of £1,900,000 over 2018 and 2019 has been identified within existing budgets and the proposed funding included in the MTFP Addition. The final detailed implications will be dependent upon the legislation development, preparatory work, and timing of the Appointed Day Acts. The papers supporting the proposed Appointed Day Acts will set out the full implications and funding at that time.

Human Rights

The notes on the human rights aspects of the draft Law in the **Appendix** have been prepared by the Law Officers' Department and are included for the information of States Members. They are not, and should not be taken as, legal advice.

²¹ Referring to 'any person' would be wide enough to cover those who treat people in care homes, or who provide them with domiciliary care or supported living arrangements.

**Human Rights Notes on the Draft Capacity and Self-Determination (Jersey)
Law 201-**

1. These Notes have been prepared in respect of the Draft Capacity and Self-Determination (Jersey) Law 201- (the “draft Law”) by the Law Officers’ Department. They summarise the principal human rights issues arising from the contents of the draft Law and explain why, in the Law Officers’ opinion, the draft Law is compatible with the European Convention on Human Rights (“ECHR”).

These notes are included for the information of States Members. They are not, and should not be taken as, legal advice.

2. The draft Law would create a scheme of legal principles and safeguards relating to decisions made by and on behalf of persons who lack capacity (whether permanently or temporarily) to make such decisions themselves. The draft Law would repeal and replace the customary law system of curatorship, and introduce for the first time in Jersey new protections, which are designed to ensure that people are enabled, so far as possible, to determine that their care and treatment are carried out in accordance with their own wishes.
3. The draft Law engages various Articles of the ECHR, which are addressed in turn.

Article 3 – Prohibition of ill treatment

4. Article 3 ECHR provides that “no one shall be subjected to torture or to inhuman or degrading treatment or punishment”. This Article 3 ECHR negative obligation (i.e. not to subject someone to inhuman or degrading treatment) is not engaged by the provisions of the draft Law. However, Article 67 makes it an offence to wilfully neglect or ill-treat a person, which may be committed by that person’s regulated carer, or by a person who has been appointed as an attorney or delegate in respect of that person under Parts 2 or 4 of the draft Law. Article 3 ECHR places a positive duty on states to provide effective protection against torture or inhuman or degrading treatment for vulnerable people through the criminal law. In this respect, Article 67 of the draft Law fulfils Jersey’s Article 3 ECHR positive obligation by providing a criminal sanction (i.e. imprisonment for a term of 5 years and a fine) to deter and punish behaviour that may amount to inhuman or degrading treatment of a vulnerable person.

Article 5 – Right to Liberty and Security

5. Article 5 ECHR protects the physical liberty and security of the person. Its aim is to ensure that no one is deprived of their liberty in an arbitrary or unjustified fashion. Article 5 ECHR is not concerned with mere restrictions on liberty of movement, and the difference between restrictions on movement serious enough to fall within the ambit of deprivation of liberty under Article 5 ECHR and mere restrictions of liberty is one of degree or intensity, not one of nature or substance. The European Court of Human Rights

(“ECtHR”) has confirmed that a deprivation of liberty for the purposes of Article 5(1) ECHR has 3 elements –

- (a) the objective element of confinement in a restricted space for a non-negligible period of time;
 - (b) the subjective element that the person has not validly consented to that confinement; and
 - (c) the detention being imputable to the state²².
6. Article 5(1) ECHR permits a deprivation of liberty in a number of specific cases, and where that deprivation is lawful and in accordance with a procedure prescribed by law. One such case is the lawful detention of persons of unsound mind. An individual cannot be deprived of his liberty as being of “unsound mind” unless the following 3 minimum conditions are satisfied –
- (a) The individual must be reliably shown, by objective medical expertise, to be of unsound mind, unless emergency detention is required.
 - (b) The individual’s mental disorder must be of a kind to warrant compulsory confinement. The deprivation of liberty must be shown to have been necessary in the circumstances.
 - (c) The mental disorder, verified by objective medical evidence, must persist throughout the period of detention.
7. The detention of a person of unsound mind is required to be in a hospital, clinic or other appropriate institution for the detention of such persons. Finally, it is important to note that the state is granted a margin of appreciation in securing compliance with Article 5 ECHR, which may be achieved in a number of different ways.
8. In the context of the draft Law, Article 5 ECHR is engaged principally by the provisions set out in Part 5 (Capacity and Liberty).

Capacity and Liberty (Part 5)

9. Part 5 of the draft Law sets out a framework of provisions which will provide a legal basis for the imposition of significant restrictions on a person’s liberty that go beyond temporary restraint.
10. The first component element of a deprivation of liberty under Article 5 ECHR, as set out in *Storck*, is the confinement of a person in a restricted space for a non-negligible period of time. The draft Law permits significant restrictions on liberty to be imposed on P (i.e. a person in respect of whom Part 5 applies) by the manager of a relevant place in which P is residing. Under Article 39(2) the significant restrictions may, for example, include not allowing P to leave the relevant place unaccompanied or limiting P’s access to only one part of a relevant place. The effect of imposing such measures, on a regular basis, would be that a person is confined to one place and this would, in most cases, fulfil the confinement element in *Storck*.
11. The second element in *Storck* is that the person has not validly consented to the confinement. This element is straightforward; a significant restriction on liberty may only be imposed where the person is assessed as lacking capacity in relation to giving consent to the arrangements (Articles 43(2)(a), 44(6)(a)).

²² *Storck v Germany* (2006) 43 EHRR 6 at [74].

12. The third element in *Storck* is that the detention must be imputable to the state which typically occurs through “direct involvement” of public authorities in the person’s detention. Part 5 applies to the detention of persons in a ‘relevant place’ which covers the hospital, an approved care home (within the meaning of the Long-Term Care (Jersey) Law 2012), or an establishment regulated under the Regulation of Care (Jersey) Law 2014. It is clear that if a deprivation of liberty takes place in a hospital or a care home that is run by the Health and Social Services Department it will be imputable to the state. Further, if an individual is in receipt of care in the private setting, but has significant restrictions on liberty authorized by the Minister, then any resulting deprivation of liberty may also be imputable to the state.
13. As the application of Part 5 will result in people being deprived of their liberty, it is imperative that Part 5 is constructed in conformity with the general principles in Article 5(1) ECHR as enunciated in relevant case law. In particular, in order to provide a lawful basis for a deprivation of liberty, Part 5 must be sufficiently certain and protect against arbitrary detention.
14. Legal certainty requires the conditions for a deprivation of liberty under domestic law to be clearly defined and that the law itself must be foreseeable in its application so that it meets the standard of ‘lawfulness’ set by the ECHR. The provisions in Part 5 meet this requirement. The circumstances in which restrictions on liberty, which may amount to a deprivation, may be imposed are clearly set out in Article 38 and are followed by detailed procedural requirements.
15. In terms of protection from arbitrariness, there are a number of features of Part 5 which provide relevant safeguards. A person considered to be of unsound mind may not be deprived of his liberty in conformity with Article 5(1)(e) ECHR without appropriate medical evidence. This requirement is satisfied by Article 44 of the draft Law, which requires any assessment that isn’t conducted by a registered medical practitioner, or where there is no current medical evidence concerning capacity, to involve an interview with a medical practitioner responsible for P’s care or designated for the purpose.
16. Following an assessment, a report must be submitted to the Minister under Article 45 providing, among other things, the assessor’s view as to the capacity and liberty matters, in Article 44(6). These include whether P lacks capacity. Moreover, for a deprivation of liberty not to be arbitrary there must be some relationship between the ground of permitted deprivation of liberty relied on and the place and conditions of detention. Where Article 5(1)(e) ECHR applies, as would be the case in justifying potential arrangements under Part 5 of the draft Law, the detention of a person for reasons relating to his mental health should be effected in a hospital, clinic or other appropriate institution. The definition of ‘relevant place’ in Article 37(3) means that the Minister will only be able to authorise the imposition of significant restrictions on P’s liberty in a hospital, approved care home or another place which has been registered under the Regulation of Care (Jersey) Law 2014.
17. It is also essential that authorizations for the deprivation of a person’s liberty are adequately assessed. In *Hillingdon London Borough Council v Neary*²³, it was held that the deprivation of liberty assessment in that case was flawed and that there was, as a result, a breach of the man’s Article 5 ECHR right. In that

²³ [2011] 4 All E.R. 584.

case the wishes of the man in question, and those of his father, had not been taken into account in the relevant assessment. The draft Law expressly provides for the views of P and his relatives, among others, to be taken into account; the initial assessment requires one or more interviews with P and other specified persons (Article 44(2)–(5)) such as P’s guardian or nearest relative. Moreover, the report on that initial assessment must identify those person’s whose views have been considered and must summarize those views (Article 45(2)(d)), and the assessor must report back to any person who has been consulted, informing them of, and explaining any, recommendations made in the report (Article 45(8)).

18. The requirement that detention not be arbitrary also implies the need for a relationship of proportionality between the ground of detention relied upon and the detention in question. The scope of the proportionality test to be applied in a given case varies depending on the type of detention involved. An individual cannot be deprived of his liberty as being of “unsound mind” unless the mental disorder is of a kind or degree, or it is necessary, to warrant compulsory confinement, and the validity of continued confinement depends upon the persistence of such a disorder (i.e. together with the requirement for medical evidence, the ‘Winterwerp’ criteria). The detention of a person may be ‘necessary’ where the person needs control and supervision to prevent him, for example, causing harm to himself or other persons.
19. The procedures set out in Part 5 of the draft Law would satisfy the Winterwerp criteria. The authorization process requires those assessing an individual to determine whether the imposition of significant restrictions is proportionate to the particular circumstances of that individual. In particular, Article 44(6)(b) of the draft Law provides that an assessment of P must enable the assessor to form a view as to whether it is necessary to impose a significant restriction on P’s liberty in the interests of P’s health or safety. In addition, where a standard authorization is in place, the manager is required to keep under review the necessity for the significant restrictions on P’s liberty which have been authorised (Article 53) and must cease to impose the restrictions if P regains capacity or where those restrictions are no longer in P’s best interests or necessary.
20. Part 5 also enables significant restrictions on a person’s liberty to be imposed pursuant to a court order under Article 57. From an Article 5 ECHR perspective, the criteria for making an order includes similar safeguards to those noted above. Article 57(2) provides that the Court may only permit the imposition of significant restrictions on P’s liberty if, among other things, it is necessary in the interests of P’s health or safety, and in P’s best interests, to do so. Further, the Court must have particular regard to the medical evidence before it when making such a determination (Article 57(4)). Article 57(3) of the draft Law also requires the Court to state the period during which the order is to have effect and must provide the full grounds for the Court’s decision.

Review of authorizations

21. Article 5(4) ECHR entitles a person deprived of his liberty to bring proceedings for review of the lawfulness of that deprivation. The opportunity for legal review must be provided soon after the person is deprived of his liberty and thereafter at reasonable intervals. A system of periodic review in which the initiative lies solely with the authorities is not sufficient on its own. Under the draft Law, a person or his representative is able to make a request to the Tribunal for a review of an authorization, and that request may be made as

soon as the authorization is issued (Article 55). Moreover, during each period of detention, which may be no longer than 12 months at a time (Article 48(2)), one request to the Tribunal may be made. The draft Law does limit the number of requests that can be made, but this is a reasonable restriction having regard to the need to properly allocate the resources of the Tribunal and having regard to the permitted maximum length of each authorization.

22. The review of the lawfulness of the continuing detention of a patient of unsound mind should be made by reference to the patient's contemporaneous state of health as evidenced by up-to-date medical assessments and not by reference to past events at the origin of the initial decision to impose significant restrictions. Article 55(3) provides that the Minister may, by Order, make provision as to the conduct of proceedings before the Tribunal. These rules may require that up-to-date medical evidence is provided as part of proceedings to review the lawfulness of continuing detention.
23. It is also important from an Article 5 ECHR perspective that the court has the power to order a release if it finds that the deprivation is unlawful; a mere power of recommendation is insufficient. Under the draft Law, the Tribunal has the power to make an order revoking an authorization (Article 55(6)(a)), which would in effect result in the lifting of restrictions.
24. The Tribunal review provision in Article 55 is also relevant in the context of the positive duty, established by ECtHR case law, on public authorities to ensure that a person deprived of liberty is not only entitled but enabled to have the lawfulness of their detention reviewed speedily by a court. Article 55 of the draft Law enables the person or his representative to request a review of an authorization by the Tribunal. In turn, a person aggrieved by a decision of the Tribunal may appeal to the Court against that decision under Article 58. These provisions are, in principle, sufficient to satisfy the States' positive obligations under Article 5(4) ECHR.
25. Article 55 also addresses another important Article 5 ECHR aspect in the provision enabling the Attorney General and the Minister to refer a patient's case to the Tribunal (Article 55(1)). This provision is important because it provides an additional Article 5(4) ECHR safeguard by ensuring that, where the patient lacks the capacity to make an application, there is another means by which the patient's case can be referred in addition to the powers of the patient's nearest person in this regard.

Certain acts of restraint etc. which are not permitted (Article 9)

26. Article 9 of the draft Law provides that an act intended to restrain a person is not permitted unless it is reasonably believed to be necessary to prevent harm and the act is a proportionate response to the likelihood and seriousness of harm being suffered. In certain situations the Article 9 power would also allow the provision of life-sustaining treatment or doing of anything necessary to prevent deterioration in a person's condition.
27. As mentioned above, in an Article 5 ECHR context, the distinction between restrictions on movement and a deprivation of liberty is one of degree or intensity. In determining whether the level of restraint involved amounts to a deprivation of liberty, regard should be had to a whole range of criteria such as the type, duration, effects and manner of implementation of the measure in question. In the context of Article 9 of the draft Law, it is anticipated that the restraining measures envisaged would be used infrequently, so would not typically be regarded as a deprivation for Article 5 ECHR purposes. Where

the frequent use of restraint results in a person being deprived of his or her liberty, the appropriate course would be to apply Part 5 of the draft Law.

Article 6 ECHR – Right to a fair trial

28. Article 6 ECHR provides for the right to a fair trial and elements of that right are engaged by the following provisions in the draft Law: Review of authorizations by Tribunal (Article 55) and Appeals (Article 58); Permitted acts in connection with care and treatment of persons lacking capacity (Article 8).

Review of authorization by Tribunal (Article 55) and Appeals (Article 58)

29. Under Article 55 of the draft Law a request for a review of a standard authorization may be made to the Tribunal and the Tribunal is required to give its view as to the capacity and liberty matters and whether significant restrictions should remain in place. Article 58 of the draft Law provides a right of appeal to the Court on a point of law for a person aggrieved by a decision of the Tribunal.
30. Article 6(1) ECHR requires that those who face a determination of their civil rights and obligations must be entitled to a fair and public hearing by an independent and impartial tribunal. The guarantees afforded by Article 6 ECHR will only be relevant to the extent that an act or a decision is determinative of a ‘civil right’ or ‘obligation’. The Tribunal under Article 55 and, in turn, the Court under Article 58 will determine whether arrangements which deprive a person of his liberty should continue. Article 6 ECHR is applicable to matters relating to the right to liberty so such decisions of the Tribunal and the Court will be determinative of a person’s civil rights for the purposes of Article 6(1) ECHR.
31. Article 6(1) ECHR imposes a number of procedural guarantees, in particular that civil rights be determined by an ‘independent and impartial tribunal’. The independence in question here is independence from the executive, the parties and the legislature. Access to an independent and impartial tribunal may be granted in 2 ways: either the decision-making body itself, e.g. the Tribunal, complies with the requirement of Article 6(1) ECHR, or the decision-making body is subject to control by a body which complies with the requirements of Article 6(1) ECHR and which has full jurisdiction. In effect, it is possible for decisions that affect civil rights to be made by bodies that do not provide all the guarantees of Article 6 ECHR, provided there is a right of review or appeal sufficient to render the proceedings as a whole compatible with Article 6 ECHR.
32. The provisions concerning the establishment and constitution of the Tribunal are set out in Part 7 of, and the Schedule to, the Draft Mental Health (Jersey) Law 201- (“MHL”). The features of the Tribunal which are most relevant to determining whether it is sufficiently independent and impartial are the manner of appointment of the members of the Tribunal, the terms of their appointment, the existence of guarantees against outside pressures, and a general appearance of independence.
33. The Bailiff will be responsible for appointing the Mental Health Review Tribunal Panel (the “Panel”) from which the members of the Tribunal shall be drawn under Article 47(1) of the MHL. The Bailiff, as a senior judicial office-holder, is sufficiently independent of the executive and the legislature to maintain the independence of the Tribunal. Moreover, Article 47(2) of the MHL provides that the Panel shall consist of ‘qualified persons’ and

Article 47(4) of the MHL defines which persons shall be ‘disqualified’ for those purposes. The disqualifications vary depending on whether the person is to be a legal, medical or lay member of the Panel and this should ensure a sufficient degree of independence. Lastly, in most cases it will be the Chairman or Vice-Chairman of the Panel who will be responsible for selecting the Tribunal members to hear a particular application (paragraph 1 of Part 1 of the Schedule to the MHL), and the Chairman and Vice-Chairman will be appointed from among the legal members of Panel.

34. Another feature of independence from an Article 6 ECHR perspective centres on the term of office of members of the Panel and methods of removing them. A tribunal with members having no specified term of office and who can be removed at the whim of the executive will not meet the requirements of independence²⁴. Tribunal Panel members will be appointed for 5-year terms (Article 48(3)(b) MHL). The appointment will only cease, or the member be removed on legitimate grounds set out in Article 48(2) and (3) of the MHL. The procedural rules for the Tribunal, which will be enacted using the order making power in paragraph 5 of Part 1 of the Schedule to the MHL, may also be used to guard against conflicts of interest or members coming under undue influence.
35. For the reasons stated above, it is considered that the Tribunal has the requisite appearance of independence and impartiality to comply with Article 6(1) ECHR. The Tribunal’s constitution ensures that members are selected by a senior member of the judiciary and protected from influence by the executive and legislative.
36. An additional guarantee of compatibility with Article 6 ECHR is afforded by the right of appeal to the Royal Court on a point of law.

Permitted acts in connection with care and treatment of persons lacking capacity (Article 8)

37. Article 8 of the draft Law provides that a person (“C”) will not incur liability for certain acts (“permitted acts”) involved in the care and treatment of another person (“P”) where specific grounds are met, for example, where C has taken steps to establish whether P lacks capacity and where it is in the best interests of P to receive the care or treatment. However, Article 8 does not operate to exclude any civil or criminal liability resulting from C’s negligence in doing a permitted act.
38. The right of access to a court is not absolute and may be subject to limitations. In order to comply with the requirements of Article 6 ECHR, a restriction on access to court must pursue a legitimate aim, and comply with the principles of proportionality and legal certainty. Such a restriction is considered proportionate to the aim of protecting staff from litigation, whilst ensuring that justifiable claims are permitted to proceed to a hearing on the merits. Article 8 of the draft Law is therefore compatible with Article 6 ECHR.

Article 8 – Right to private life

39. Article 8 ECHR is engaged by numerous provisions in the draft Law: Power of the Court to order medical reports (Article 29); Capacity and liberty assessments (Part 5); Powers of Independent Capacity Advocates (Article 62); Research involving persons lacking capacity (Article 66).

²⁴ *Dauti v Austria*, App.No.19206/05, judgment of February 9, 2009, para 53.

Capacity and liberty assessments (Part 5)

40. Part 5 of the draft Law sets out a framework of provisions for conducting capacity and liberty assessments and, within that framework, there are a number of provisions which will engage the Article 8 ECHR right to private life. The Article 8 ECHR right to private life includes the right to have and develop relationships with others. The significant restrictions on liberty that may be authorised under Part 5, which are described in Article 39(2) of the draft Law, may restrict P's social contact with persons other than those caring for him. As a result, Part 5 may be used to authorise interference with the Article 8 ECHR rights of persons.
41. Any interference with the Article 8(1) ECHR right must be justified under Article 8(2) ECHR, meaning it must be: (a) in accordance with the law; (b) in pursuit of one of the legitimate aims set out in Article 8(2) ECHR; and (c) necessary in a democratic society. 'Necessity' requires the identification of a pressing social need and the existence of relevant and sufficient reasons to justify the interference at issue. A measure will only be proportionate to the legitimate aim if supported by sufficiently persuasive reasons.
42. Part 5 of the draft Law is sufficiently precise and accessible that significant restrictions imposed pursuant to it will be imposed in accordance with the law for Article 5 ECHR purposes. Further, the imposition of restrictive measures to protect the health and safety of P, will pursue a legitimate aim mentioned in Article 8(2) ECHR.
43. Where a person lacks capacity and there are health and safety concerns resulting from that condition, significant restrictions of the type listed in Article 39(2) may be necessary to safely care for a person lacking capacity. The interference with the Article 8 ECHR rights of P may be proportionate, those exercising the powers in Part 5 must ensure they consider the proportionality of any restrictions imposed in each case.
44. The presence of procedural safeguards which mitigate the risk of the excessive exercise of powers interfering with private life and help ensure Article 8 ECHR compatibility of these provisions. As explained already in respect of Article 5 of the ECHR, Part 5 of the draft Law sets out a clear process that must be followed and sufficient safeguards on the authority to impose significant restrictions on a person's liberty for this purpose.

Power of the Court to order medical reports (Article 29)

45. Article 29(3)(c) of the draft Law provides the Court with a power to order the carrying out of medical, psychiatric or psychological assessments of P. The rationale for providing this power is to enable the Court to better exercise its functions under Part 4 of the draft Law, i.e. the appointment of delegates to manage the affairs of P or to make decisions as to P's health and welfare.
46. Physical assessments engage the Article 8 ECHR right to privacy and associated principles of dignity. The draft Law does not seek to impose a regime of compulsory tests but, nonetheless, there are clear sensitivities that go with providing a power for the Court to order that assessments are conducted. The Article 29 power is, however, hedged by safeguards: the person performing the assessment must be qualified to do so and there is a clear purpose specified in Article 29(1) for conducting the assessments. In practice, the conduct of physical assessments must be proportionate, particularly as consent will be absent.

Investigation powers of Independent Capacity Advocates (Article 62)

47. Article 62(3) of the draft Law provides that Regulations may make provision for powers of independent capacity advocates (ICAs) to examine and take copies of any documents, records or other information kept by the Minister, the Commission or the manager of a relevant place, which may be relevant to the exercise of a function by an ICA. The disclosure of irrelevant material to an ICA could constitute a breach of the subject's right to confidentiality and to respect for private life under Article 8 ECHR. When any Regulations under Article 62(3) of the draft Law are brought forward it will be important for any powers of investigation to be formulated and exercised in a proportionate manner to the legitimate aims involved, which would typically be the protection of health and the rights of others.

Research involving persons lacking capacity

48. Article 66 of the draft Law provides that the States may by Regulations make provisions as to the extent and circumstances in which it may be lawful to conduct intrusive research involving a person who lacks capacity to consent to such research. In some cases at least the conduct of this research may involve physical treatment of the patient or intensive observation.
49. Medical treatment, examinations or observational research, involving a patient who has not provided his or her consent, will amount to an interference with private life. The conduct of research under Regulations made pursuant to Article 66 is necessary for determining the causes and consequences of mental incapacity and to develop effective treatment for medical conditions. That purpose would fall squarely within one of the permitted grounds for interference with the Article 8(1) right within Article 8(2) ECHR. The key question is one of proportionality and the Regulations will need to ensure a balance between the legitimate aim of research and the interference with the subjects' Article 8 ECHR rights.

Authorization as authority to take and convey P (Article 60)

50. Article 60 of the draft Law provides that an authorization under Part 5 shall be sufficient authority for the manager of a relevant place or any other person authorized by M for the purpose to take P and convey him or her to the relevant place.
51. A power such as this, which it is expected would be exercised to take a person from their own home, would constitute an interference with Article 8(1) ECHR which guarantees a right to respect for private life and for one's home, unless a justification can be found under Article 8(2) ECHR. In most cases, the interference would be justified on the ground that it was "necessary ... for the protection of [P's] health" and, considering the statutory intention of exercising that power in order to bring a person within the Part 5 framework, imposed in the interests of P's health and safety, the interference would be proportionate in principle.

Article 1 of the First Protocol of the ECHR ("A1P1") – Right to Property

52. There are a number of provisions and features of the draft Law that engage A1P1: Payments by, and on behalf of, person lacking capacity (Article 10); Powers of the Court in relation to operation of LPA (Article 20); Provision which may be made under Part 4 as to the property and affairs of a person lacking capacity (Article 28), powers of Court in relation to wills and trusts

(Articles 30 and 31) and powers of Court in relation to P's immoveable property (Article 32).

Payments on behalf of a person lacking capacity (Article 10)

53. Article 10 of the draft Law provides a power for a person ("C") who is responsible for the care and treatment of a person lacking capacity ("P") to use money in P's possession to meet the payment, or as reimbursement for payment, for permitted acts. C may also pledge P's credit for the purpose of the payment of such acts.
54. This may amount to an interference with the A1P1 rights of P. However, such an interference may be justified where it is in the public interest, subject to conditions laid down by law and is proportionate to the aim pursued.
55. The 'public interest' engaged by the Article 10 power is two-fold; it is health-based, in that it is in the general interest to ensure that those who lack capacity are properly cared for; and it has a simple economic basis, in that those caring for others who lack capacity should not be left out-of-pocket in performing that role. Accordingly, the power for C to apply P's money to meet expenses associated with permitted acts would be deemed necessary to meet those general interests. It should also be noted that where property rights are concerned, states have a considerable margin of appreciation in determining the existence of an issue of general public concern and in implementing measures designed to meet it.
56. A further strand of justification under A1P1 is the need for measures to be in accordance with the law. Article 10 satisfies this requirement. The latter aspect is generally thought not applicable in domestic matters such as this.
57. Proportionality requires a fair balance to be struck between the means employed in furtherance of the general interest identified, and the protection of the individual's fundamental rights. The requisite balance will not be struck if the person concerned has had to bear an individual and excessive burden. The use of P's possessions in order to meet the cost of payments or as reimbursement for acts associated with P's care is proportionate to the general interests mentioned above.

Powers of the Court in relation to operation of LPA

58. Article 20 of the draft Law provides that the Court may determine questions as to the meaning or effect of an LPA and may give directions with respect to a decision which is within the authority conferred by an LPA and, amongst other things, as to remuneration or expenses. The Court may also give any consent or authorization to act which would otherwise have had to be obtained from the person who made the LPA, in particular with respect to the making of gifts (Article 20(3)).
59. The exercise of these powers by the Court may interfere with the A1P1 rights of P or other persons. In terms of the justification for the interference with the A1P1 right there are many examples in ECtHR case law of matters relating to economic and health reasons being identified as the legitimate aim against which interference is justified. The extent and degree to which the Court will exercise this power will depend on the particular circumstances, and the Court will be able to assess the proportionality of these powers in any particular case that comes before it.

Provision which may be made under Part 4 as to the property and affairs of a person lacking capacity

60. There are a collection of provisions in Part 4 of the draft Law (Appointment of Delegates and Related Powers of the Court) which would provide court appointed delegates and the Court with a number of powers over or in relation to the property and related interests of a person who lacks capacity.
61. Article 28 of the draft Law provides the power for a delegate to exercise a range of powers in relation to the property and affairs of P. Those powers include the control and management of P's property, the sale, exchange, charging, gift or other disposition of P's property and the carrying on, on P's behalf, of any profession, trade or business. Articles 28(3) and 30 of the draft Law provide the Court with the power to execute wills and to make any provision (e.g. as to disposal of property or the exercise of a power) which could be made under a will executed by P and to exercise trustee powers which are vested in P. Article 31 of the draft Law provides the Court with the power to make vesting or other orders, including those which the Court might otherwise make under the Trusts (Jersey) Law 1984. This power includes making orders for the varying or revoking of any settlement of P's property on trust where appropriate, and in relation to the management of property and the preservation of interests in property subject to a disposal order. Article 32 provides the Court with the power to make orders for the maintenance or improvement of P's property or for the permanent benefit of P, including for the expenditure of P's property and as to securing that expenditure. Finally, Article 35 of the draft Law provides a Court appointed delegate to deal with P's property including to do or secure anything for maintenance purposes or for the payment of P's debts.
62. From an ECHR perspective, the powers described above will usually, when exercised, engage A1P1. Those powers may be exercised in relation to a number of property interests which could amount to a 'possession' for A1P1 purposes. A1P1 encapsulates property rights which may arise including immovable and moveable property interests.
63. In terms of whether the interference with the A1P1 right is justified, there is a clear public interest in the financial affairs of those persons who lose capacity being properly and fairly dealt managed. As noted above, where property rights are concerned, states have a considerable margin of appreciation in determining the existence of a problem of general public concern and in implementing measures designed to meet it. Part 4 may therefore be regarded as addressing an identifiable public interest, and the powers of the courts and delegates are necessary to satisfy this public interest and are not excessive. Therefore Part 4 is compatible with A1P1.

Explanatory Note

This draft Law would create a scheme of legal principles and safeguards relating to decisions made by and on behalf of persons who lack capacity (whether permanently or temporarily) to make such decisions themselves. It would introduce for the first time in Jersey new protections (such as the provisions concerning lasting powers of attorney, in Part 2 of this Law), all of which are designed to ensure that people are enabled, so far and for as long as possible, to determine that their care and treatment are carried out in accordance with their own wishes. It would repeal legislative provisions relating to the customary law system of curatorship, and replace that system by the appointment of delegates in particular circumstances, as set out in Part 4.

Part 1 contains general matters which apply for the purposes of the whole of the Law. *Article 1* gives general definitions. *Article 2* deals with persons to whom the Law applies, and provides that powers exercisable under the Law in respect of a person who lacks capacity to make a decision shall not be exercisable in respect of a child under 16 (though the Royal Court, or a delegate appointed under Part 4 of the Law, may make decisions about the property and affairs of a child under 16 where the Court considers that when the child reaches that age, he or she will continue to lack capacity to make decisions about such matters). *Article 3* states the over-arching principles to which regard must be had by anyone applying a provision of the Law. These are, that a person must be assumed to have capacity unless otherwise shown and is not to be treated as unable to make a decision unless all practicable steps to assist him or her to do so have been taken unsuccessfully, nor merely because he or she makes an unwise decision. The final principle is that all acts done or decisions made on behalf of a person who lacks capacity must be done or made in that person's best interests. (*Article 6* amplifies how the best interests of a person lacking capacity may be evaluated.)

Article 4 defines what amounts to lack of capacity for the purposes of the Law, which is to be evaluated at the time of each particular decision: a person lacks capacity in relation to a decision if he or she is unable to make the decision because of an impairment or disturbance of the mind or brain. That impairment or disturbance may be either permanent or temporary, and the cause of it is not significant for these purposes. *Article 4* also states that lack of capacity cannot be evaluated merely on the basis of a person's age, appearance, condition or behaviour. *Article 5* provides that in this context a person is considered to be unable to make a decision if he or she cannot understand relevant information or retain such information long enough to make the decision, cannot use or weigh the information in making the decision, nor communicate the decision itself by any means. However, the Law would also ensure that certain decisions can never be made on one person's behalf by another, and *Article 7* lists such significant decisions, which include consent to sexual relations, fertility treatments, adoption, and divorce. (This list may be amended by Regulations.)

Articles 8 and *9* deal with potential liability of a person for acts done in connection with care or treatment of a person lacking capacity. *Article 8* provides that the carer is not liable for an act that is done in the best interests of a person whom the carer reasonably believes to lack capacity, so long as the act is not negligent nor contrary to any advance decision to refuse treatment (provision as to such advance decisions is made by Part 3). However, *Article 9* removes the immunity provided by *Article 8* in relation to an act of restraint, unless the carer reasonably believes that such an act is necessary to prevent harm and is a proportionate response to the likelihood and

seriousness of that harm. Article 9 also defines restraint for this purpose, and provides that a carer may not do any act which conflicts with a valid decision made by a person appointed under a lasting power of attorney (under Part 2) or by a delegate, unless such an act provides life-sustaining treatment or is necessary to prevent a serious deterioration in a person's condition, while a decision of the Court is awaited. *Article 10* describes the circumstances in which payments may legally be made by or on behalf of a person lacking capacity.

Part 2 of the Law would permit the creation of lasting powers of attorney ("LPAs") by persons aged 18 or over who have capacity to do so. Authority may be conferred by LPAs in relation to decisions about matters of health and personal welfare, or about property and affairs, in cases where the person conferring the authority subsequently lacks capacity to make such decisions (*Article 11*). *Article 12* describes the persons on whom authority may be conferred by LPAs. *Article 13* requires LPAs to be made in accordance with the requirements of Part 2 and of Part 1 of the *Schedule* to the Law, and to be registered by the Judicial Greffe in accordance with Part 2 of the *Schedule*. *Articles 14 to 16* delimit the scope of the authority which may be conferred by health and welfare LPAs and property and affairs LPAs respectively. In particular, the former do not override any advance decision to refuse treatment under Part 3, and the latter do not confer, except to the extent stipulated, any right to dispose of the property of the person who has conferred the authority, by making gifts.

LPAs may be revoked in the circumstances, or upon the occurrence of events, described in *Article 17*, which include the situation where the person appointed by the LPA dies or loses capacity to act. *Article 18* preserves the validity of transactions already undertaken where the LPA is revoked, and of acts done in the belief that authority has been genuinely conferred by LPA though that is not the case. *Article 19* provides that the Royal Court may determine questions arising as to validity of LPAs, and sets out the powers which the Court may exercise in doing so. *Article 20* makes similar provision for the determination by the Court of questions as to the meaning or effect of LPAs or instruments purporting to confer such authority.

Part 3 of the Law makes provision for advance decisions to refuse treatment to be made by persons aged 16 years or over who have capacity to make such decisions. *Article 21* provides that such decisions do not need to be expressed in medical terms, and that they may be withdrawn or altered at any time without the need for formalities. However, by *Article 22* advance decisions do not take effect unless they are valid and applicable to the treatment in question at the material time. *Article 22* also specifies the respects in which an advance decision would not be applicable to treatment. In particular, such a decision would not be applicable if the person who had made it regained capacity to give or refuse consent to the treatment; and a decision relating to life-sustaining treatment is not applicable unless it is in writing and fulfils the requirements of *Article 22(5)*. Where an advance decision is effective, *Article 23* provides that a person withholding or withdrawing a treatment to which it applies does not incur liability. The Royal Court may, under *Article 23(4)*, make declarations as to whether an advance decision exists and/or is effective, for the further avoidance of doubt.

Part 4 of the Law would make provision about the powers of the Royal Court itself to make declarations or decisions in respect of persons lacking capacity, and to appoint delegates to act on behalf of such persons. *Article 24* sets out the scope of the Court's general powers in this respect and in particular provides that any powers conferred on a delegate must be limited in scope and duration to what is reasonably necessary having regard to all the circumstances. *Article 25* lists the persons who may apply to

the Court for the exercise of its powers. *Article 26* sets out the procedure to be followed for applications to the Court in respect of persons who are undergoing treatment in an approved establishment within the meaning of the Mental Health (Jersey) Law 201- (P.78/2016), or who are received into guardianship under that Law. In such cases the applications may be made by the Attorney General. *Article 27* makes further specific provision as to the kinds of decision which may or may not be made by the Court or a delegate appointed to deal with a person's health and welfare, and in particular provides that a delegate may decide where a person is to live, and may give or refuse consent to health care treatment, but only the Court may prohibit personal contact, direct a change in health care provision, or refuse consent to the continuation of life-sustaining treatment. *Article 28* makes similar provision as to the powers which may or may not be exercised by the Court or a delegate appointed to deal with a person's property and affairs: a delegate's powers include control and management of the person's existing property and carrying out of any contracts entered into by the person, but only the Court may settle a person's property or execute a will on behalf of a person. *Article 29* enables the Court to order reports as to a person's condition or circumstances, for the purpose of the exercise of the Court's powers under Part 4. *Article 30* sets out the powers of the Court in relation to making wills and requiring or authorizing persons (whether appointed as delegates or not) to do so on behalf of other persons. *Article 31* provides that the Court may make vesting orders, and may in certain circumstances revoke or vary settlements on trust, or make orders or give directions to preserve beneficial interests. *Article 32* confers power on the Court to order or direct expenditure for the maintenance or permanent benefit of a person's property. *Article 33* is a Regulation-making power to enable further provision to be made as to the Court's powers under Part 4.

Articles 34 to 36 are concerned with the qualifications, conduct and powers of delegates. *Article 34* deals with qualifications, such as the requirement that an individual must be aged over 18 to be appointed as a delegate, and also with general powers and the limits to such powers (for example, the Court may set a financial limit on the delegate's authority). A delegate is entitled to be reimbursed for reasonable expenses. The Court may also require delegates to give security, and to provide reports. *Article 35* sets out the general powers of delegates, to do everything which appears necessary or expedient to be done in the interests of persons on behalf of whom they are appointed, and also indicates the limits of those powers, and in particular provides that decisions may not be made which conflict with decisions made within the scope of a lasting power of attorney. *Article 36* confers power on the States to make Regulations designating a person or office as having responsibility for supervising delegates, and also as to the investigatory and reporting powers of such a person or office; imposing liability on delegates towards a person or the person's property; and creating criminal offences where a delegate fails to comply with requirements imposed by or under this Law.

Part 5 of the Law establishes the lawful basis on which the manager of a hospital, an approved care home within the meaning of the Long-Term Care (Jersey) Law 2012, or an establishment regulated under the Regulation of Care (Jersey) Law 2014 (a "relevant place") may impose a significant restriction on the liberty of a person lacking capacity. *Article 37* is the interpretation provision for the purposes of Part 5. *Article 38* provides the basic safeguard, which is that a significant restriction which might amount to a deprivation of liberty may be imposed only if, in respect of a person lacking capacity, an urgent or standard authorization of such a deprivation has been granted by the Minister, or an order of the Court has been made granting similar authorization, or the restriction is necessary to enable the administration of life-sustaining treatment. *Article 39* defines the measures which amount to significant

restrictions on liberty if applied on a regular basis. Such measures include not permitting a person to leave a relevant place, controlling the person's access within the place, controlling the person's actions, and subjecting the person to continuous supervision.

Article 40 imposes a duty on the Minister to designate independent assessors (who must be registered medical practitioners or persons otherwise in registrable occupations under the Health Care (Registration) (Jersey) Law 1995) to carry out assessments under Part 5, and confers a power to make provision by Order to enable fees to be charged in respect of such assessments. The Minister must also maintain a register of persons appointed as assessors. Under *Article 41(1)* the Minister must not authorize a significant deprivation of liberty unless the authorization is urgent (as defined by *Article 42*), or an assessment carried out in accordance with *Articles 43 to 46* has concluded that the significant deprivation of liberty is justified. Under *Article 41(2)* the Minister must appoint an assessor to carry out an initial assessment upon receipt of a request or where the Minister otherwise becomes aware that the conditions in *Article 43(2)* are fulfilled. *Article 43* provides that where a person lacks capacity and is or will be subject to a significant deprivation of liberty in a relevant place, the manager must notify the Minister of those matters and must request an assessment of the person.

Article 44 makes provision as to the manner in which assessments are to be carried out, that is, by interviews with the person concerned and, if the assessor is not a registered medical practitioner, with a registered medical practitioner who has recently examined the person. The assessment may also take account of interviews with or representations from such other persons as are listed in *Article 44(5)* and who may, in the assessor's view, be appropriate. These include the person's guardian or nearest relative, or any delegate appointed under Part 4. The assessment must be such as to enable the assessor to form a view as to whether the person lacks capacity to consent to arrangements for his or her treatment, and whether it is necessary to impose a significant restriction as a component of that care or treatment, and if so whether it is in the person's best interests for such a restriction to be imposed. *Article 45* requires the report of an assessment to be provided to the Minister within 21 days of the appointment of the assessor, and to include such matters as are specified in that Article, in particular the assessor's views as to the capacity and liberty matters, and any recommendations as to the imposition of significant restrictions which may be justified by such matters. In making the recommendations the assessor must consider whether the restrictions are a proportionate response to the likelihood of the person's suffering any harm, and the seriousness of such harm, should it occur. *Article 45* also requires a copy of the report to be given to the manager.

If the report is affirmative (i.e. if the assessor considers that the imposition of significant restriction on liberty is justified), the effect of *Articles 46 and 48* is that the Minister may authorize the imposition of significant restrictions on liberty for a period of no more than 12 months. (This is called a 'standard authorization'.) *Article 48* obliges the Minister to give notice (in a form to be specified by code of practice) of the authorization to the manager of the relevant place and to the assessor. *Article 48* also makes further provision as to the powers of the Minister to authorize restrictions other than those recommended by assessors. Under *Article 50* the person affected by the restriction must be notified of it, and of all the rights of advocacy, support and review etc. available under this Law. That information must be given to the person affected both in writing and orally, and must also be given to anyone acting on behalf of the person as listed in *Article 44(5)*. If the person has no such representative at that time, *Article 51* provides that the Minister must appoint an independent capacity

advocate, in accordance with Part 6, to represent the person in respect of the significant deprivation of liberty.

Article 47 requires the Minister to keep a record of all assessments carried out and all authorizations given under Part 5.

Article 46(1) provides that if an assessment is negative, no further assessment may be carried out and no standard authorization may be granted to impose a deprivation of liberty, except where there is a material change justifying a fresh application for an assessment, or an assessment which has already been carried out was mistaken in a material respect.

Article 49 permits reports of assessments which appear to the Minister to be incorrect or defective to be rectified by the Minister or, with the Minister's consent, by the assessor. *Article 49* also imposes a duty on the Minister to give notice, if a recommendation in a report is insufficient to found a significant deprivation of liberty, that the recommendation is therefore to be disregarded.

A standard authorization may not be renewed except in accordance with *Article 52*. Under that Article, notice may be given by the manager to the Minister within 28 days of the date on which a standard authorization is due to expire, if the manager considers that it is necessary to continue to impose a significant restriction on a person's liberty. The Minister must then as soon as practicable appoint an assessor to carry out a renewal assessment, and if the report of that assessment is affirmative, the Minister may either renew the standard authorization or request a further medical assessment.

Further mechanisms for review of authorizations are provided by *Articles 53* and *55*. *Article 53* imposes a duty on the manager concerned to keep under review the necessity for every significant restriction authorized by a standard authorization. If it appears to the manager that the person concerned has regained capacity and does not consent to a restriction, or if the continued imposition of the restriction is no longer necessary in the interests of the person's health or safety or in his or her best interests, the manager may cease to impose the restriction, but must inform the Minister of doing so. *Article 55* provides for review of authorizations by the Tribunal, on the application of the person concerned, his or her representative, the Minister, or the Attorney General. Only one such application may be made during the continuation of a standard authorization. *Article 55(3)* confers an Order-making power to enable further provision to be made as to applications to, and proceedings before, the Tribunal, and as to the Tribunal's powers to dispose of applications. Paragraphs (4) to (6) of *Article 55* go on to set out the Tribunal's general duties and powers in respect of reviews.

Article 56 enables the Minister to monitor the application and use of authorizations and the operation of significant deprivations of liberty, as provided either in that Article or further by a code of practice. A person aggrieved by a decision of the Tribunal may appeal to the Royal Court, under *Article 58*, against that decision on a point of law.

Article 57 gives the Royal Court power to make an order authorizing the imposition of a significant restriction on liberty, where a person lacks capacity to give consent to arrangements for his or her care or treatment and it is both necessary in the interests of the person's health or safety, and in his or her best interests, to do so. To be valid such an order must comply with *Article 57(3)*.

Article 59 makes it lawful for one person temporarily to impose a significant restriction on another's liberty where the restriction is essential for the purpose of administering life-sustaining treatment or doing anything to prevent a serious deterioration in a person's condition.

Article 54 preserves the continuity of an authorization where there is a change in the identity of the manager of a relevant place, or a person to whom the authorization relates is to be moved from one relevant place to another. *Article 60* provides that an authorization (including an order of the Court) under Part 5 is sufficient authority for the person to whom it relates to be taken and conveyed to a relevant place and admitted and detained there for the period specified in the authorization.

Part 6 would make provision for the appointment of independent capacity advocates, both for the purposes already mentioned in Part 5 and to provide assistance and support to persons lacking capacity to make certain decisions, as described in *Article 61*. *Article 62* enables the States by Regulations to require the Minister to make arrangements for the appointment of independent capacity advocates, and such Regulations may in particular make provision as to the qualifications, monitoring, payment and functions of such advocates. Under *Article 62(4)* the Minister must have regard to the principle that a person must be represented by another who is independent of any person responsible for the decision in question. *Article 63* sets out the basic functions of independent capacity advocates, which include supporting a person to participate as fully as possible in any decision concerning him or her, obtaining and evaluating information in relation to representing and supporting a person or that person's best interests, obtaining further medical opinions and ascertaining alternative courses of action, if any. Under *Article 63*, Regulations may also make provision as to circumstances in which independent capacity advocates may challenge or assist a person in challenging decisions affecting him or her (or his or her best interests) under this Law.

In particular, independent capacity advocates are to be involved in decisions as to serious medical treatment and as to arrangements for or changes to a person's accommodation in a relevant place. Where either type of decision is under consideration by the Minister or any other person with power to make such a decision, *Articles 64* and *65* respectively provide that an independent capacity advocate must be instructed to represent the person concerned and his or her best interests before the treatment is provided or the decision is taken, except in cases of urgency. "Serious medical treatment" is defined by *Article 64* as proposed treatment which would be likely to involve serious consequences for the person receiving it, or which would entail a fine balance between the risks and benefits of the treatment for that person.

Part 7 contains general and miscellaneous provisions, two of which create additional general safeguards for persons lacking capacity. *Article 66* enables the States to make Regulations governing the extent to which, and the circumstances in which, intrusive research involving persons lacking capacity to consent to such research may lawfully be undertaken. *Article 67* creates an offence of wilful neglect, punishable by imprisonment of up to 5 years and an unlimited fine, by a person who has the care of another person or is appointed under a lasting power of attorney or as a delegate on behalf of another person.

The remaining provisions of Part 7 relate to the further implementation of the Law. Under *Article 68* the Minister must issue codes of practice relating to the exercise of functions under this Law by carers, donees of lasting powers of attorney, delegates, assessors for the purpose of Part 5, independent capacity advocates, and persons carrying out research. Failure to comply with a code of practice is admissible as evidence where relevant to a question arising in criminal or civil proceedings, though such failure does not of itself amount to liability. Before making a code of practice the Minister must consult any bodies concerned, and must publish a code in such manner

as may appear appropriate for bringing it to the attention of persons likely to be concerned with or affected by its provisions.

Articles 69 and 70 would confer, on the States and on the Minister respectively, general powers to make Regulations and Orders. The power to make Orders includes a power to provide for the amount of fees or charges under this Law. *Article 71* would extend the power to make rules of court under the Royal Court (Jersey) Law 1948 to include power to make rules regulating practice or procedure before the Court in connection with proceedings under this Law. *Article 72* would provide for the customary law concerning curatorship to cease to have effect.

Article 73 would provide for the citation of this Law and for its commencement on a day to be appointed by Act of the States.



Jersey

DRAFT CAPACITY AND SELF-DETERMINATION (JERSEY) LAW 201-

Arrangement

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Jersey

DRAFT CAPACITY AND SELF-DETERMINATION (JERSEY) LAW 201-

A LAW to make provision relating to individuals who lack capacity, and in particular to provide for the circumstances in which, and the procedures by which, certain decisions may be taken in relation to or on behalf of such individuals; to establish a new regime of assessments and authorizations for the proper care and management of such individuals; to make provision relating to anticipatory instructions refusing treatment; and for connected purposes

Adopted by the States [date to be inserted]

Sanctioned by Order of Her Majesty in Council [date to be inserted]

Registered by the Royal Court [date to be inserted]

THE STATES, subject to the sanction of Her Most Excellent Majesty in Council, have adopted the following Law –

PART 1

INTERPRETATION AND GENERAL PRINCIPLES

1 Interpretation

(1) In this Law –

“best interests” shall be interpreted in accordance with Article 6;

“child” means a person under 18 years of age;

“Court” means the Royal Court;

“delegate” means a person appointed as such under Article 24;

“lack of capacity” shall be interpreted in accordance with Article 4;

“life-sustaining treatment” means any treatment necessary, in the view of a person providing health care for a person lacking capacity, to sustain the latter person’s life;

“lasting power of attorney” or “LPA” has the meaning given by Article 11(1);

“Mental Health Law” means the Mental Health (Jersey) Law 201-¹;

“permitted act” has the meaning given by Article 8(2);

“prescribed” means prescribed by an Order made by the Minister under Article 70.

- (2) A word or expression used in this Law and defined in the Mental Health Law shall, unless otherwise indicated or required by the context, be taken to have the same meaning for the purposes of this Law as that word or expression is given in the Mental Health Law.

2 Persons in respect of whom this Law applies

- (1) The powers exercisable under this Law in respect of a person who lacks capacity shall not (subject to paragraph (2)) be exercisable in respect of a person under 16 years of age.
- (2) The Court, or a delegate appointed to do so under Part 4, may make decisions in relation to a person’s property and affairs even though the person has not reached the age of 16, if the Court considers it is likely that the person will lack capacity to make such decisions when he or she reaches that age.

3 Principles to be applied

- (1) In the application of this Law –
- (a) a person must be assumed to have capacity, unless it is shown that the person lacks capacity in the sense given to that expression by Article 4;
 - (b) a person is not to be treated (under Article 5 or otherwise) as unable to make a decision –
 - (i) unless all practicable steps to enable that person to make the decision have been taken without success, nor
 - (ii) merely because the person makes an unwise decision;and
 - (c) an act done, or a decision made, on behalf of a person lacking capacity must be done or made in the person’s best interests.
- (2) Without derogation from the generality of the principle stated in paragraph (1)(c), before an act is done or a decision is made which is restrictive of the person’s rights and freedom of action, regard must be had to whether the purpose for which the act or decision is needed can be achieved as effectively in a less restrictive way.
- (3) In paragraph (1)(b) and Articles 2, 4, 5 and 6, “decision” means a decision which is not excluded by the operation of Article 7.

4 Lack of capacity

- (1) For the purposes of this Law, a person lacks capacity in relation to a matter if, at the material time –

- (a) the person is unable to make his or her own decision in relation to the matter (as further provided by Article 5); because
 - (b) he or she suffers from an impairment or a disturbance in the functioning of his or her mind or brain.
- (2) For the purpose of the application of paragraph (1)(b) it does not matter –
- (a) whether the impairment or disturbance is permanent or temporary; nor
 - (b) what the cause of the impairment or disturbance may be.
- (3) Lack of capacity cannot be established merely by reference to –
- (a) a person's age or appearance; or
 - (b) a person's condition, or an aspect of a person's behaviour, which might lead others to make unjustified assumptions about the person's capacity.
- (4) In proceedings under this Law or any other enactment, the question as to whether a person lacks capacity for the purposes of this Law must be decided on the balance of probabilities.

5 Inability to make a decision

- (1) For the purpose of the application of Article 4(1)(a), a person is unable to make his or her own decision if he or she cannot –
- (a) understand information relevant to that decision;
 - (b) retain the information for a period, however short, which is sufficient to make the decision;
 - (c) use or weigh the information in making the decision; or
 - (d) communicate the decision (whether by speech, sign language, or any other means).
- (2) Information relevant to a decision includes information about the reasonably foreseeable consequences of deciding one way or another, or of failing to make the decision.

6 Best interests

- (1) For the purposes of this Law, a determination as to what is in the best interests of a person lacking capacity –
- (a) must not be made merely on the basis of –
 - (i) the person's age or appearance, or
 - (ii) any other aspect of his or her condition or behaviour;
 - (b) must not be made unless, so far as reasonably practicable, the person lacking capacity has been permitted, encouraged and supported to participate as fully as possible in any act done for or any decision affecting that person; and
 - (c) must consider all relevant circumstances, including in particular the matters set out in paragraphs (2) to (4).

-
- (2) Such a determination must include consideration of whether it is likely that the person lacking capacity will at some time have capacity in relation to the matter in question, and if so, when that is likely to be.
 - (3) Such a determination must include consideration, so far as the following matters are reasonably ascertainable, of –
 - (a) the past and present wishes and feelings of the person lacking capacity as to the matter in question (including in particular any advance decision to refuse treatment or other written statement made by that person at a time when that person did not lack capacity);
 - (b) the beliefs and values of that person which would be likely to influence that person's decision if that person did not lack capacity;
 - (c) any other factors which that person would be likely to consider if that person did not lack capacity.
 - (4) Such a determination must take into account, if it is practicable and appropriate to consult the following persons, the views of –
 - (a) anyone named by the person lacking capacity as someone to be consulted on the matter in question or matters of that kind;
 - (b) anyone engaged in caring for that person or interested in that person's welfare;
 - (c) any person on whom authority is conferred under a lasting power of attorney granted by that person and applicable to the matter in question; and
 - (d) any delegate appointed by the Court under Part 4.
 - (5) A determination relating to life-sustaining treatment shall be not regarded as being in the best interests of a person lacking capacity if the determination is motivated by a desire to bring about that person's death.
 - (6) In the case of an act done or decision made under this Law by a person other than the Court, it is sufficient if (having complied with the requirements of paragraphs (1) to (5)) the person reasonably believes that the act or decision is in the best interests of the person lacking capacity on whose behalf the act is done or the decision is made.

7 Excluded decisions

- (1) Nothing in this Law shall be taken to permit –
 - (a) consent to be given, on behalf of another person, to –
 - (i) marriage or a civil partnership,
 - (ii) sexual relations,
 - (iii) a decree of divorce, or (in relation to a civil partnership) a dissolution order being made,
 - (iv) a child's being placed for adoption by the Adoption Service,
 - (v) the making of an adoption order,
 - (vi) organ donation, or
 - (vii) fertility treatment; or

- (b) a decision to be made, on behalf of another person, on the discharge of parental responsibilities in matters other than those relating to a child's property.
- (2) The States may by Regulations amend paragraph (1) for the purpose of adding or removing any matter listed in that paragraph.
- (3) Nothing in this Law authorizes anyone –
 - (a) to give a patient treatment for mental disorder; or
 - (b) to consent to such treatment being given to a patient,if, at the time when it is proposed to give the treatment, the patient's treatment is regulated by Part 6 of the Mental Health Law.
- (4) In paragraph (3) "treatment" has the meaning given by Article 1(1) of the Mental Health Law, and paragraph (3) may be disapplied, by Regulations made under Article 46 of that Law, in relation to a child who is capable of understanding the nature, purpose and likely effects of the treatment.
- (5) Nothing in this Law permits a decision on voting at an election for any public office, or in a referendum, to be made on behalf of another person.

8 Permitted acts in connection with care and treatment of persons lacking capacity

- (1) Paragraph (2) applies, subject to Article 9, to an act done by one person ("C" in this Part) in connection with the care and treatment of another person ("P" in this Part), but only if –
 - (a) before doing the act, C has taken reasonable steps to establish whether P lacks capacity in relation to the matter in question; and
 - (b) when doing the act, C reasonably believes –
 - (i) that P lacks capacity in relation to the matter in question, and
 - (ii) it will be in P's best interests for the act to be done.
- (2) C does not incur any liability for an act to which this paragraph applies (a "permitted act") which C would not have incurred if P –
 - (a) had had capacity to give consent in relation to the matter in question; and
 - (b) had consented to C's doing the act.
- (3) Nothing in this Article –
 - (a) excludes any civil or criminal liability of C resulting from C's negligence in doing a permitted act; or
 - (b) affects the operation of Part 3.

9 Certain acts of restraint etc. which are not permitted

- (1) An act by C which is intended to restrain P is not a permitted act, unless –
 - (a) C reasonably believes that it is necessary to do the act in order to prevent harm to P; and
 - (b) the act is a proportionate response to –

- (i) the likelihood of P's suffering harm, and
 - (ii) the seriousness of that harm.
- (2) For the purposes of paragraph (1), C restrains P if C –
 - (a) uses, or threatens to use, force to secure the doing of an act which P resists; and
 - (b) restricts P's liberty of movement, whether or not P resists or objects to the restriction.
- (3) Article 8(2) and this Article do not generally authorize C to do any act which conflicts with a valid decision made by –
 - (a) any other person appointed under a LPA granted by P; or
 - (b) a delegate appointed for P by the Court.
- (4) But an act described in paragraph (3) may be a permitted act, where the act involves –
 - (a) providing life-sustaining treatment; or
 - (b) doing anything which C reasonably believes to be necessary to prevent a serious deterioration in P's condition,while awaiting a decision of the Court in respect of any relevant issue.

10 Payments by, and on behalf of, person lacking capacity

- (1) If necessary goods or services are supplied to a person who lacks capacity to contract for the supply, that person must pay a reasonable price for the goods or services.
- (2) In paragraph (1), "necessary" means suitable, at the time of supply, to the person's condition in life and to his or her actual requirements.
- (3) If a permitted act involves payment, C may –
 - (a) use money in P's possession –
 - (i) to meet the payment, or
 - (ii) as reimbursement for payment made on P's behalf by C;
 - (b) be otherwise indemnified by P; and
 - (c) pledge P's credit for the purpose of the payment.
- (4) Paragraph (3) does not affect any other power under which C or any person –
 - (a) has lawful control of P's money or other property; or
 - (b) has power to spend money for P's benefit.

PART 2

LASTING POWERS OF ATTORNEY

11 “Lasting power of attorney”: nature and definition

- (1) In this Law, “lasting power of attorney” or “LPA” refers to a power of attorney –
 - (a) by which one person, who is aged 18 years or older and has capacity to do so (“P” in this Part), confers –
 - (i) on another person, who is a person fulfilling the requirements of Article 12(1) (“A” in this Part),
 - (ii) authority to make decisions about all or any of the matters specified in paragraph (2); and
 - (b) which includes authority to make such decisions in circumstances where P lacks capacity to do so.
- (2) The matters mentioned in paragraph (1)(a)ii are –
 - (a) P’s health and welfare, or specified matters concerning P’s health and welfare (and an instrument, or the part of an instrument, which deals with such matters is referred to in this Part as a “health and welfare LPA”); or
 - (b) P’s property and affairs, or specified matters concerning P’s property and affairs (and an instrument, or the part of an instrument, which deals with such matters is referred to in this Part as a “property and affairs LPA”).
- (3) Authority conferred by any LPA may be made subject to such conditions or restrictions as may be specified in the LPA.
- (4) In particular, and without derogation from paragraphs (1) to (3), a property and affairs LPA may include provision permitting the exercise (whether generally or in specified circumstances) of A’s powers under the LPA where P does not lack capacity.
- (5) In this Part, reference to an instrument is to a form or other instrument by which a lasting power of attorney is conferred or purports to be conferred.

12 Persons appointed by LPA

- (1) A lasting power of attorney may confer authority on one or more persons, but –
 - (a) an individual person must for this purpose be aged 18 years or over; and
 - (b) a property and affairs LPA may not confer authority on a person who is subject to a declaration of bankruptcy in Jersey or any insolvency or proceedings of a similar nature to bankruptcy in any place outside Jersey.
- (2) Where authority is conferred on more than one person, the instrument may provide that such persons are to act –

- (a) in respect of all matters either jointly, or jointly and severally; or
 - (b) in respect of some specified matters, jointly and in respect of others, jointly and severally.
- (3) To the extent that any instrument does not make express provision as envisaged by paragraph (2), it is to be assumed that all persons on whom it confers authority are to act jointly.
- (4) If an instrument provides that persons are to act jointly and severally, and any one of those persons does not fulfil a requirement in paragraph (1)(a) or (b) –
- (a) the instrument shall not take effect in the case of that person; but
 - (b) this shall not prevent a lasting power of attorney being conferred on the other persons.
- (5) An instrument used to create a lasting power of attorney –
- (a) cannot give a person power to appoint a substitute or successor; but
 - (b) may itself appoint persons to act as substitutes on the occurrence of an event mentioned in Article 17(3) to (5).
- (6) Where authority is conferred by a lasting power of attorney upon 2 or more persons, “A” in this Part refers to all or any of those persons.

13 Formalities for creation and registration of LPA

- (1) A lasting power of attorney is not validly created in Jersey unless –
- (a) the instrument purporting to create it complies with the requirements of this Part, and with the requirements as to execution in, and prescribed under, Part 1 of the Schedule; and
 - (b) it is registered by the Judicial Greffe in accordance with the requirements as to registration in Part 2 of the Schedule.
- (2) Where a power of attorney is first registered (by “original registration”) in a jurisdiction of the British Islands other than Jersey, it may have effect in Jersey –
- (a) if such evidence as to the original registration as the States may by Regulations require is provided to the Judicial Greffe; and
 - (b) for so long as the original registration validly subsists,
- as though it were a lasting power of attorney created and registered in Jersey under paragraph (1), and for this purpose the Judicial Greffe shall register and deal with such a power of attorney in accordance with Part 2 of the Schedule subject to such modifications as the States may by Regulations make to the Schedule for this purpose.

14 Scope of LPA: health and welfare

- (1) Authority conferred by a health and welfare LPA –
- (a) does not extend to making decisions about P’s personal welfare in circumstances other than those where P lacks capacity or A reasonably believes that P lacks capacity to make such decisions;

- (b) is subject to the provisions of Part 3 (as to advance decisions to refuse treatment); and
 - (c) extends, subject to paragraph (2), to giving or refusing consent to the carrying out or continuation of treatment by a person providing health care for P.
- (2) Paragraph (1)(c) –
- (a) does not authorize the giving or refusing of consent to the carrying out or continuation of life-sustaining treatment, unless the instrument contains express provision to that effect; and
 - (b) is subject to any conditions or restrictions in the instrument.

15 Scope of LPA: property and affairs

- (1) The authority conferred by a property and affairs LPA may include –
- (a) to the extent provided by paragraph (2) and not otherwise, a right to dispose of P’s property by making gifts; and
 - (b) power to do, or secure the doing of, anything necessary or expedient –
 - (i) for the maintenance or other benefit of P, P’s family or dependents, and
 - (ii) for the payment of P’s debts, whether legally enforceable or not.
- (2) Subject to any conditions or restrictions in the instrument, A may make gifts of P’s property –
- (a) on customary occasions to persons (including A) who are related to or connected with P; and
 - (b) to any charity to which P made gifts or might have been expected to make gifts,
- if the value of each such gift is not unreasonable having regard to all the circumstances and in particular to the size of P’s estate.
- (3) For the purposes of paragraph (2), a “customary occasion” means –
- (a) the occasion or anniversary of a birth or marriage or formation of a civil partnership; and
 - (b) any other occasion on which presents are customarily given within families or among friends and associates.

16 Scope of LPA: general

- (1) A person on whom authority is conferred by lasting power of attorney is to be treated as P’s agent in relation to anything done in accordance with the instrument and in the exercise of that authority.
- (2) In the absence of any condition or provision to the contrary in the instrument, a person on whom authority is conferred by lasting power of attorney –

- (a) may, in the exercise of that power, do, or secure the doing of, anything which appears to the person to be necessary or expedient to be done to be in P's best interests;
- (b) may be reimbursed (subject to such limit as may be prescribed, whether by reference to a proportion of P's property or to an amount or otherwise) out of P's property for reasonable expenses in the discharge of functions when acting in the exercise of that power.

17 Revocation etc. of LPA

- (1) This Article applies where –
 - (a) P has executed an instrument with a view to conferring a lasting power of attorney; or
 - (b) a lasting power of attorney is registered as having been conferred by P.
- (2) At any time when P has capacity to do so, P may revoke the lasting power of attorney (and in this Article, a reference to revocation includes revocation of the instrument by which the power is created).
- (3) A declaration of bankruptcy in relation to P has effect to revoke a property and affairs LPA conferred by P.
- (4) Subject to paragraph (6), an event occurring in relation to A which is listed in paragraph (5) has effect to revoke the lasting power of attorney and to terminate A's appointment under it.
- (5) The events mentioned in paragraph (4) are –
 - (a) disclaimer of the appointment by A, in accordance with such requirements as may be prescribed for that purpose;
 - (b) A's death;
 - (c) subject to paragraph (7) and Article 12(4), a declaration of bankruptcy in relation to A;
 - (d) subject to paragraph (8), dissolution or annulment of a marriage or civil partnership between P and A; and
 - (e) A's own lack of capacity.
- (6) An event occurring in relation to A which is listed in paragraph (5) has effect to terminate A's appointment but does not revoke the lasting power of attorney, if –
 - (a) A is replaced by a substitute, under the terms of the instrument; or
 - (b) A is one of 2 or more persons appointed to act jointly and severally in respect of any matter and, after the event, at least one such person (other than A) remains.
- (7) A declaration of bankruptcy in relation to A does not terminate A's appointment or revoke authority conferred on A to the extent that the authority relates to P's health and welfare.

- (8) Dissolution or annulment of a marriage or civil partnership does not terminate A's appointment nor revoke a lasting power of attorney if the instrument provided that such an event was not to do so.
- (9) In this Article, "bankruptcy" includes any insolvency or proceedings of a similar nature to bankruptcy in any place outside Jersey.

18 Protection where LPA not valid

- (1) Paragraphs (2) and (3) apply where –
 - (a) an instrument has been registered as a lasting power of attorney; but
 - (b) a lasting power of attorney was not created (whether or not the registration is cancelled at the time of an act or transaction mentioned in paragraphs (2) to (4)).
- (2) When acting in purported exercise of a lasting power of attorney, A does not incur any liability (to P or any other person) unless at the time of so acting –
 - (a) A knows that no lasting power of attorney has been created; or
 - (b) A is aware of circumstances which, if a lasting power of attorney had been created, would have terminated A's appointment.
- (3) Any transaction between A and another person is, in favour of that person, as valid as if a lasting power of attorney had been in existence unless at the time of the transaction that other person –
 - (a) knows that no lasting power of attorney has been created; or
 - (b) is aware of circumstances which, if a lasting power of attorney had been created, would have terminated A's appointment.
- (4) If the interest of a purchaser depends on whether a transaction between A and another person was valid by virtue of paragraph (3), it shall be conclusively presumed in favour of the purchaser that the transaction was valid if the other person makes an affidavit –
 - (a) either before, or within 3 months following, the completion of the purchase; and
 - (b) stating that the person did not at the material time know of the termination of A's appointment.

19 Powers of Court in relation to creation and validity of LPA

- (1) The Court may determine any question arising as to whether –
 - (a) one or more of the requirements for the creation of a lasting power of attorney have been met; or
 - (b) a lasting power of attorney has been revoked or otherwise come to an end.
- (2) The powers conferred by paragraph (3) may be exercised if the Court is satisfied –
 - (a) that fraud or undue pressure was used to induce P –

- (i) to execute an instrument for the purpose of creating a lasting power of attorney, or
 - (ii) to create a lasting power of attorney;
 - or
 - (b) that any person on whom authority is conferred by a lasting power of attorney has behaved, is behaving, or proposes to behave in a way which contravenes that authority or is otherwise not in P's interests.
- (3) Where the Court is satisfied as mentioned in paragraph (2), the Court may –
- (a) direct that an instrument purporting to create a lasting power of attorney is not to be registered; and
 - (b) if P lacks capacity to do so, revoke the purported instrument or the lasting power of attorney.
- (4) In exercising the power conferred by paragraph (3)(b), the Court may revoke a lasting power of attorney in part only, including only to the extent that it confers authority on any particular person or is intended to do so.

20 Powers of Court in relation to operation of LPA

- (1) The Court may determine any question as to the meaning or effect of a lasting power of attorney or of any instrument purporting to confer authority by a lasting power of attorney.
- (2) The Court may give directions –
- (a) with respect to a decision which is within the authority conferred on A by a lasting power of attorney, if P lacks capacity to make the decision; and
 - (b) as to –
 - (i) the rendering of reports or accounts by A and the production of records kept by A for the purpose of such reports or accounts, and
 - (ii) A's remuneration or expenses,if P lacks capacity to do so.
- (3) The Court may give any consent or authorization to act which A would otherwise have had to obtain from P if P had capacity to give it, and in particular may authorize the making of gifts which are not permitted by Article 16.
- (4) The Court may require A to supply information, or to produce documents or any other things, which are within A's possession as a result of the authority conferred on A by a lasting power of attorney.
- (5) The Court may relieve A wholly or partly from any liability which A has or may have incurred as a result of breach of duties imposed on A by a lasting power of attorney.

PART 3

ADVANCE DECISIONS TO REFUSE TREATMENT

21 Decisions to which this Part applies

- (1) In this Part, “advance decision” means a decision made by a person aged 16 years or over who has capacity to make the decision (“P” in this Part), that specified treatment is not to be carried out or continued by a person providing health care for P, if –
 - (a) at a later time and in such circumstances as P may specify, the treatment is proposed to be carried out or continued; and
 - (b) at that time P lacks capacity to consent to the treatment.
- (2) For the purposes of paragraph (1) –
 - (a) a decision made before the coming into force of this Part may, if it otherwise fulfils the requirements as to validity and applicability in Article 22, be treated as an advance decision; and
 - (b) a decision may be regarded as specifying a treatment or circumstances even though the decision is expressed in non-medical terms.
- (3) P may alter or withdraw an advance decision at any time when P has capacity to do so, and –
 - (a) a withdrawal need not be in writing; and
 - (b) an alteration need not be in writing, except as required by Article 22(5) where the advance decision relates to life-sustaining treatment.

22 Validity and applicability of advance decisions

- (1) An advance decision does not have effect in accordance with Article 23, unless at the material time the decision is –
 - (a) valid; and
 - (b) applicable to the treatment.
- (2) An advance decision is not valid if P does anything (including withdrawing the decision) which is inconsistent with the advance decision remaining P’s fixed decision.
- (3) An advance decision is not applicable to any treatment if at the material time P has capacity to give or refuse consent to that treatment.
- (4) An advance decision is not applicable to the treatment in question if –
 - (a) the treatment is not treatment specified in the advance decision;
 - (b) any circumstances specified in the advance decision are absent; or
 - (c) there are reasonable grounds for believing that circumstances exist at the material time which P did not anticipate at the time of making the decision, but which would have affected P’s decision if P had done so.

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- (5) An advance decision is not applicable to life-sustaining treatment unless –
- (a) it is verified by a statement by P that it is to apply to that treatment even if P’s life is at risk;
 - (b) it is in writing signed by P or by another person in P’s presence and at P’s direction;
 - (c) the signature is made or acknowledged by P in the presence of a witness; and
 - (d) the witness signs the decision in P’s presence.

23 Effect of advance decisions

- (1) An advance decision which is –
- (a) valid; and
 - (b) applicable to a treatment,
- in accordance with Article 22 (an “effective advance decision”) has effect as if P made it, and had capacity to make it, at the time when a question arises as to whether the treatment should be carried out or continued.
- (2) A person does not incur liability for carrying out or continuing the treatment unless, at the time when that question arises, the person –
- (a) knows that an effective advance decision exists; and
 - (b) despite that knowledge, carries out or continues the treatment.
- (3) A person does not incur liability for the consequences of withholding or withdrawing a treatment from P if, at the time, the person reasonably believes that an effective advance decision exists.
- (4) The Court may make declarations as to whether an advance decision –
- (a) exists;
 - (b) is valid;
 - (c) is applicable to a treatment.
- (5) While a declaration of the Court is awaited, nothing in this Article or any apparent or apparently effective advance decision prevents a person –
- (a) providing life-sustaining treatment; or
 - (b) doing any act which the person reasonably believes to be necessary to prevent a serious deterioration in P’s condition.

PART 4

APPOINTMENT OF DELEGATES AND RELATED POWERS OF THE COURT

24 General power of the Court to make declarations and decisions, and to appoint delegates

- (1) The Court may make declarations as to –

- (a) whether a person (“P” in this Part) has or lacks capacity to make a decision specified in the declaration;
- (b) whether P has or lacks capacity to make decisions on such matters as are described in the declaration;
- (c) the lawfulness of any act done, or proposed to be done, in relation to P,

and for the purpose of sub-paragraph (c), “act” includes a course of conduct.

- (2) If P lacks capacity in relation to a matter concerning P’s health or welfare or P’s property and affairs, the Court may, on an application made to it under Article 25 –

- (a) by order make a decision on P’s behalf as to the matter; or
- (b) appoint a delegate to make a decision on P’s behalf as to such matters,

in accordance with this Part, and having regard in particular to Articles 3 to 6.

- (3) In appointing a delegate the Court must ensure that the scope and duration of the appointment are no greater than reasonably necessary having regard to all relevant circumstances.

- (4) Without derogation from Article 25, the Court may make an order, give directions or appoint a delegate on such terms as it considers are in P’s best interests even though no application is before it for an order, directions or appointment in those terms.

- (5) Having regard to the provisions of this Part and to Article 34 in particular, the Court may –

- (a) make such further orders;
- (b) give such directions; and
- (c) confer such powers, or impose such duties,

as the Court thinks necessary or expedient for giving effect to, or otherwise in connection with, an order or appointment under paragraph (2), including (where the Court is satisfied that it is in P’s best interests to do so) varying or discharging any previous order.

- (6) In particular, in the exercise of its powers under paragraph (5), the Court may –

- (a) revoke the appointment of a delegate; or
- (b) vary the powers conferred on a delegate,

if the Court is satisfied that the delegate has behaved, is behaving or proposes to behave in a way that contravenes the authority conferred by the Court or is not in P’s best interests.

- (7) Paragraph (8) applies where –

- (a) an application has been made to the Court under Article 25; and
- (b) the Court intends to exercise its powers under paragraph (2).

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- (8) Where this paragraph applies, the Court may, pending determination of the application, make an order or give directions in respect of any matter, if there is reason to believe that –
- (a) P lacks capacity as to the matter; and
 - (b) it is in P’s best interests that the order is made, or the directions are given, without delay.
- (9) The specific powers conferred by this Article are without prejudice to or derogation from the general jurisdiction of the Court and the Court shall have, in relation to any proceedings under this Part, all such power to act of its own motion as it has in relation to any other proceedings.

25 Applications to Court for exercise of powers under Article 24

- (1) An application for the exercise of the Court’s power under Article 24(2) may be made by an applicant who is –
- (a) P, notwithstanding P is alleged to lack capacity;
 - (b) P’s spouse or civil partner;
 - (c) where P and another person (whether of the same or the opposite sex) are not married to each other but are living together as spouses or civil partners, that other person;
 - (d) P’s child or step-child;
 - (e) P’s parent or step-parent, or (if P is aged under 18 years) any other person with parental responsibility for P;
 - (f) P’s brother, sister, half-brother, half-sister, step-brother or step-sister;
 - (g) P’s grandparent;
 - (h) a delegate appointed for P by the Court (in relation only to the exercise of power under Article 24(2)(a));
 - (i) a person (“D” for the purposes of Part 2) appointed by P under a lasting power of attorney;
 - (j) a person named in an existing order of the Court made in relation to P, if the application relates to that order;
 - (k) an independent capacity advocate appointed to represent P under Article 51; or
 - (l) the Attorney General.
- (2) An application for such an exercise of the Court’s power may be made by a person not mentioned in paragraph (1) with the Court’s permission, and in deciding whether to admit such an application the Court must have regard to –
- (a) the applicant’s connection with P;
 - (b) the reasons for the application;
 - (c) the potential benefit to P of the proposed order or directions; and
 - (d) whether that benefit can be achieved in any other way.

26 Application in case of person admitted to approved establishment

- (1) This Article applies where P is a person who –
 - (a) has been admitted to an approved establishment under Part 3 of the Mental Health Law; or
 - (b) has been received into guardianship under Part 4 of that Law.
- (2) Where this Article applies, and –
 - (a) no person has been appointed (whether under the Mental Health Law or under this Law) either to take decisions as to P's health and welfare or to manage or administer P's property and affairs; and
 - (b) in the opinion of the responsible medical officer or registered medical practitioner in charge of P's treatment, P lacks capacity to make decisions as to P's health and welfare or P's property and affairs,

the Minister shall report the matter to the Attorney General.
- (3) Where the Attorney General –
 - (a) receives a report under paragraph (2) in respect of P; or
 - (b) otherwise has reason to believe that P lacks capacity to make decisions as to P's health and welfare or P's property and affairs,

the Attorney General may apply to the Court for a delegate to be appointed under this Part (or for such other order as the Attorney General or the Court may think fit).

27 Specific provision which may be made under this Part as to P's health and welfare

- (1) Subject to paragraph (2), the power which may be exercised by the Court or by a delegate in relation to P's health and welfare includes in particular the power of –
 - (a) deciding where P is to live;
 - (b) deciding what contact, if any, P is to have with specified persons; and
 - (c) giving or refusing consent to the carrying out or continuation of treatment by a person providing health care for P.
- (2) Only the Court (and not a delegate) may –
 - (a) prohibit a named person from having contact with P;
 - (b) direct a person providing health care for P to allow a different person to take over that responsibility; or
 - (c) refuse consent to the continuation of life-sustaining treatment.

28 Specific provision which may be made under this Part as to P's property and affairs

- (1) Subject to paragraphs (2) and (3), the power which may be exercised by the Court or by a delegate in relation to P's property and affairs includes

in particular all such powers as P might, on his or her own behalf and in accordance with the law of Jersey, exercise in relation to –

- (a) the control and management of P's property;
 - (b) the sale, exchange, charging, gift or other disposition of P's property;
 - (c) the acquisition of property in P's name or on P's behalf;
 - (d) the carrying on, on P's behalf, of any profession, trade or business;
 - (e) decisions having the effect of dissolving a partnership of which P is a member;
 - (f) the carrying out of any contract entered into by P;
 - (g) the discharge of P's debts and of any of P's obligations whether legally enforceable or not;
 - (h) the conduct of legal proceedings in P's name or on P's behalf.
- (2) The sale, exchange, charging, gift or other disposition of P's property may not be carried out except in compliance with any conditions or restrictions imposed by the Court on such sale, exchange etc.
 - (3) Only the Court (and not a delegate) may exercise, in accordance with the further requirements of Articles 30 and 31, power in relation to –
 - (a) the settlement of P's property, whether for P's own benefit or the benefit of others;
 - (b) the execution for P of a will;
 - (c) the exercise of any power (including a power to consent) vested in P whether beneficially or as trustee or otherwise.

29 Power of Court to order medical etc. reports

- (1) Without derogation from the general power conferred by Article 24, the Court may, in accordance with paragraph (2) and where the Court considers it necessary or expedient to do so for the purpose of the exercise of its powers under this Part, order the preparation of a report as to P's condition or circumstances (including, but not limited to, P's medical or psychological condition, P's social circumstances or social factors affecting P).
- (2) The Court's order under paragraph (1) may be addressed to –
 - (a) any party to the proceedings under Article 24; and
 - (b) where the Court is satisfied that it is reasonable to do so, any other person.
- (3) Where the Court makes an order under paragraph (1), the person preparing the report must be permitted by any other person having responsibility for P's care or treatment –
 - (a) to interview P in private;
 - (b) at all reasonable times to examine and take copies of any health records or records maintained by a person having responsibility for P's care or treatment; and

- (c) to carry out such medical, psychiatric or psychological assessment of P as the person may be qualified to perform.

30 Powers of Court in relation to wills

- (1) The power of the Court under Article 28(3)(b) extends to making any provision (including, but not limited to, the disposal of property or the exercise of a power) which could be made under a will executed by P if P had capacity to do so, and subject to paragraph (2), such provision shall have effect for all purposes as if it were provision made by a will validly executed under Jersey law by a person with capacity.
- (2) Paragraph (1) does not apply to the extent that –
 - (a) a will disposes of immovable property outside Jersey; or
 - (b) at the time when the will is to be executed, P is domiciled outside Jersey and any question of P's testamentary capacity would fall to be determined in accordance with the law of P's domicile.
- (3) For the purpose of the exercise of the Court's power under Article 28(3)(b) and this Article, the Court may make an order or give directions authorizing any person (whether appointed as a delegate under this Part or not) to execute a will on behalf of P.
- (4) Such an order or directions as mentioned in paragraph (3) shall include the requirements that the will executed on behalf of P must –
 - (a) state that it is signed by P acting by the authorized person;
 - (b) be signed by the authorized person with the name of P and that person's own name, in the presence of no less than 2 witnesses;
 - (c) be attested and subscribed by those witnesses in the presence of the authorized person; and
 - (d) be sealed with the official seal of the Court.

31 Powers of Court in relation to trusts

- (1) The Court may, in the exercise of its power under Article 28(3), make such vesting or other orders as the case may require, including (for the avoidance of doubt) any order which the Court may otherwise make under the Trusts (Jersey) Law 1984.
- (2) In particular and without derogation from the generality of the Court's powers, the Court may make orders and give directions as provided by paragraphs (3) to (5).
- (3) The Court may by order vary or revoke a settlement of P's property on trust, if –
 - (a) the settlement makes provision for variation or revocation; or
 - (b) the Court is satisfied that –
 - (i) a mistake was made in relation to the exercise of power over, or in relation to, a trust or trust property,

- (ii) the power would not have been so exercised, but for that mistake, and
- (iii) the mistake is of so serious a character as to render it just for the Court to make an order under this paragraph,

and the Court may for this purpose give all such incidental or consequential directions as the Court considers necessary.

- (4) The Court may make orders and give directions in relation to the vesting of property in, or management of property by, a person other than P (whether that person is appointed as a delegate under this Part or not) if the Court is satisfied that –
 - (a) under the law prevailing in a place outside Jersey, that other person has been appointed to exercise powers of management of P's property and affairs on the ground (however formulated or expressed) that P lacks capacity in this respect; and
 - (b) having regard to the nature of the appointment and the circumstances of the case, it is expedient for the Court so to order or direct.
- (5) The Court may make such order or give such directions as it considers appropriate to preserve any person's interest in P's property where –
 - (a) that property is to be disposed of by order of the Court or by a delegate or person ordered or directed to do so under paragraph (4); and
 - (b) but for the disposal, the person would have benefited from an interest in P's property (whether under P's will or intestacy or any other legal interest, or by way of a gift perfected, or nomination taking effect on, P's death).

32 Powers of Court in relation to P's property

- (1) The Court may make such orders or give such directions as it may consider appropriate for the purpose of maintaining or improving P's property or otherwise for the permanent benefit of P's property.
- (2) For the avoidance of doubt the power conferred by paragraph (1) includes power to make orders or give directions as to the expenditure of P's property for the purpose mentioned in that paragraph and as to securing such expenditure.

33 Regulations as to powers of Court under this Part

The States may by Regulations make further provision as to the powers of the Court for the purposes of this Part, including, but not limited to, provision as to the circumstances in which the Court may appoint a person to exercise any of P's functions as patron of a benefice.

34 Qualifications of and general provisions concerning delegates

- (1) Any person may be appointed by the Court as a delegate under this Part, but an individual person must for this purpose be aged 18 years or over.

- (2) A delegate must give consent to being appointed as such.
- (3) The Court may appoint an individual by appointing the holder for the time being of a specified office or position (including, for the avoidance of doubt, the Viscount, in his or her capacity as such).
- (4) The Court may appoint 2 or more delegates to act –
 - (a) jointly;
 - (b) jointly and severally; or
 - (c) jointly in respect of some matters and jointly and severally in respect of other matters.
- (5) The Court may, at the same time as appointing any delegate, appoint one or more other persons to succeed a delegate in such circumstances, or on the happening of such events, and for such period, as the Court may specify.
- (6) A delegate is to be treated as P's agent in relation to anything done within the scope of the delegate's appointment and in accordance with this Part, but the powers and duties imposed by the Court on the appointment of a delegate may include (without derogation from the generality of the Court's powers in this respect) the imposition of a financial limit on the delegate's authority.
- (7) A delegate is entitled to be reimbursed out of P's property for reasonable expenses in the discharge of functions when acting as delegate, and the Court may direct, when appointing a delegate, that the delegate should be entitled to remuneration out of P's property for so acting (subject to such limit as may be prescribed, whether by reference to a proportion of P's property or to an amount or otherwise).
- (8) The Court may require a delegate –
 - (a) to give to the Attorney General or (as the Court may specify) the Judicial Greffier such security as the Court thinks fit for the due discharge of the delegate's functions; and
 - (b) to provide to the Court, or to such other persons as the Court may specify, such reports at such times or intervals as the Court may direct.
- (9) In the exercise of its powers under paragraph (8)(b), the Court shall have regard to any further provision which may be made by the States by Regulations with respect to the supervision of delegates, under Article 36.
- (10) The appointment of a delegate shall cease upon the death of the delegate or of P, or upon the delegate's resignation, but P's death shall not affect the legality of anything done by the delegate in good faith and without knowing of P's death.

35 Powers of delegates

- (1) Subject to paragraphs (2) to (4) and to any restriction or condition imposed by the Court on the appointment of a delegate, a delegate may do, or secure the doing of, anything which appears to the delegate to be necessary or expedient to be done in P's best interests.

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- (2) In a case where a delegate is appointed to deal with P's property and affairs, the power conferred by paragraph (1) includes power to do or secure the doing of anything necessary or expedient –
 - (a) for the maintenance or other benefit of P, P's family or dependents; and
 - (b) for the payment of P's debts, whether legally enforceable or not.
 - (3) A delegate may not make a decision on behalf of P which is inconsistent with a decision made –
 - (a) within the scope of authority conferred by a lasting power of attorney granted by P and in accordance with this Law;
 - (b) by the person ("A" for the purposes of Part 2) on whom such authority is conferred.
 - (4) A delegate must make all decisions on behalf of P in P's best interests and without undue delay.

36 Supervision of persons acting on P's behalf under Parts 2 and 4

- (1) The States may by Regulations designate a person or office as having responsibility for –
 - (a) supervision of the conduct of delegates and of persons exercising authority under lasting powers of attorney;
 - (b) monitoring compliance of delegates with the provisions of this Law and with any specific authority conferred upon particular delegates by the Court or upon particular persons by any lasting power of attorney; and
 - (c) investigating complaints against delegates and persons exercising authority under lasting powers of attorney, and, where necessary, drawing such complaints to the attention of the Court.
- (2) Such provision may, further and in particular, make provision as to the payment of fees, including the amount of such fees, when a report is provided to the Court under Article 34(8)(b).
- (3) The States may further by such Regulations make provision –
 - (a) as to the investigatory and reporting powers of any person or office designated under paragraph (1);
 - (b) for –
 - (i) the creation of criminal offences, punishable by a fine of level 3 on the standard scale, and
 - (ii) the imposition of liability towards P or P's estate, where a delegate or a person exercising authority under a lasting power of attorney fails to comply with relevant provisions of the Regulations or of this Law; and
 - (c) concerning disclosure of, and access to, information held by –
 - (i) a delegate,
 - (ii) a person exercising authority under a lasting power of attorney, or

- (iii) a person or office designated by Regulations under paragraph (1),
including provision for the inspection of such information at such times and places and by such persons as may be specified.

PART 5

CAPACITY AND LIBERTY

37 Interpretation and application of Part 5

(1) In this Part –

“affirmative”, in relation to a report, has the meaning given by Article 46(3);

“approved care home” means an establishment to which Article 6 of the Long-Term Care (Jersey) Law 2012² applies;

“assessor” means a person designated under Article 40;

“capacity and liberty matters” has the meaning given by Article 44(6);

“Commission” means the Health and Social Care Commission established under Article 35 of the Regulation of Care (Jersey) Law 2014³;

“independent capacity advocate” means a person appointed as such under Part 6;

“M” means the manager of a relevant place;

“negative”, in relation to a report or assessment, has the meaning given by Article 46(2);

“P” means a person in respect of whom this Part applies as further provided by paragraph (2);

“registered person” has the same meaning as is given to that expression by Article 1 of the Long-Term Care (Jersey) Law 2012⁴;

“relevant place” has the meaning given by paragraph (3);

“significant restriction on liberty” has the meaning given by Article 39;

“standard authorization” has the meaning given by Article 48;

“Tribunal” means the Mental Health Review Tribunal established under Part 7 of the Mental Health Law; and

“urgent authorization” has the meaning given by Article 42.

(2) This Part –

(a) does not apply where P is a person liable to be detained under Part 3 of the Mental Health Law; and

(b) except for Article 59, does not apply where P is a person undergoing life-sustaining treatment in any place (and for this

purpose “place” includes an ambulance or other vehicle used by the emergency services).

- (3) For the purposes of this Part a “relevant place” means a hospital (except any accident or emergency department of a hospital), an approved care home or any establishment regulated under the Regulation of Care (Jersey) Law 2014⁵, or designated by the Minister, for the purpose of providing health or social care.

38 Circumstances permitting significant restriction on liberty

- (1) If, and only if, one of the criteria in paragraph (2) is fulfilled in respect of P, the manager (“M”) of a relevant place in which P is residing may lawfully impose on P a significant restriction which would otherwise amount to a deprivation of P’s liberty.
- (2) The criteria mentioned in paragraph (1) are that, in respect of P –
 - (a) an urgent authorization has been granted by the Minister under Article 42;
 - (b) a standard authorization has been granted by the Minister under Article 48;
 - (c) an order of the Court has been made under Article 57; or
 - (d) the restriction is necessary to enable life-sustaining treatment to be given, as further provided by Article 59.
- (3) Where one of the criteria in paragraph (2) is fulfilled, a person doing any act for the purpose of maintaining a significant restriction on P’s liberty does not incur any liability, in relation to the act, which would not have been incurred if P had capacity to consent, and had consented, to the act being done.
- (4) Paragraphs (1) and (3) –
 - (a) do not exclude the civil liability of any person for loss or damage, or the criminal liability of any person, resulting from negligence in doing an act; and
 - (b) do not authorize a person to do anything except for the purpose of, and in accordance with any conditions of, the authorization or order of the Court (as the case may be) applying in respect of P.

39 Significant restrictions on liberty

- (1) A measure listed in paragraph (2) amounts to a significant restriction on P’s liberty if it applies to P on a regular basis.
- (2) The measures mentioned in paragraph (1) are that –
 - (a) P is not allowed, unaccompanied, to leave the relevant place;
 - (b) P is unable to leave the relevant place unassisted, by reason of P’s physical impairment or mental disorder, and such assistance as it may be reasonably practicable to provide to P for this purpose is not provided;

- (c) P's actions are so controlled in the relevant place as to limit P's access to part only of that place;
 - (d) P's actions are controlled, whether or not in the relevant place, by the application of physical force or of restraint as defined in Article 9(2);
 - (e) P is subject, whether or not in the relevant place, to continuous supervision;
 - (f) P's social contact, whether or not in the relevant place, with persons other than those caring for him or her in the relevant place, is restricted.
- (3) A measure applicable to all residents at a relevant place (other than staff employed at the place) which –
- (a) is intended to facilitate the proper management of that place; and
 - (b) does not excessively or unreasonably disadvantage P in particular,
- shall not be regarded as a significant restriction on P's liberty.
- (4) For the purposes of paragraph (2)(b), and for the avoidance of doubt –
- (a) P is not to be regarded as subject to a significant restriction on 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.
- (5) The States may by Regulations amend this Article.

40 Arrangements to be made by Minister: designation of assessors

- (1) For the purposes of assessments to be carried out in accordance with this Part and in fulfilment of the duty imposed by Article 41(2), the Minister must –
- (a) designate registered persons to act as assessors under this Part, and maintain a register of persons so designated; and
 - (b) determine the appropriate level of training or professional qualification to be required of persons who may be so designated.
- (2) The Minister may for the purposes stated in paragraph (1) –
- (a) make all such provision by Order as is necessary to enable fees to be charged by, and payments to be made to, assessors, including provision in relation to the amount or level of such fees; and
 - (b) do all other things which may be reasonably necessary for those purposes.
- (3) The States may by Regulations make further provision as to arrangements to be made for the purposes stated in paragraph (1), and such provision may include amendment of this Article and the time limit in Article 45(1)(b).

41 Arrangements to be made by Minister: requirement for authorization

- (1) The Minister must not authorize the imposition of a significant deprivation of liberty unless –
 - (a) the authorization is urgent within the meaning of Article 42; or
 - (b) the necessity for such a deprivation has been confirmed by the report of an assessor, following an assessment carried out in accordance with Articles 43 to 46.
- (2) Where –
 - (a) the Minister receives a request from M under Article 43; or
 - (b) the Minister otherwise becomes aware that Article 43(1)(a) applies and the conditions in Article 43(2) are fulfilled in respect of P,the Minister must as soon as practicable and without undue delay appoint a person to carry out an assessment as mentioned in paragraph (1).

42 Urgent authorizations

- (1) An application may be made to the Minister for an urgent authorization by an assessor or by M, if the applicant reasonably believes that –
 - (a) the duty imposed by Article 43(3) applies to M;
 - (b) it is necessary, in the interests of P's health or safety, that M should have authority to impose a significant restriction on P's liberty before a standard authorization could reasonably be expected to be granted; and
 - (c) it is in P's best interests to be provided with care or treatment in circumstances which would amount to a significant restriction on P's liberty.
- (2) An application under paragraph (1) must be in writing and in such form as may be required under a code of practice under Article 68, but in any event must contain the following matters –
 - (a) P's name;
 - (b) M's name and the name of any other registered person concerned;
 - (c) the name and address of the relevant place;
 - (d) the grounds for the application; and
 - (e) the nature and extent of the proposed restriction on P's liberty.
- (3) Upon receipt of an application duly made under this Article, the Minister must immediately –
 - (a) give notice in writing to M that an urgent authorization is granted; and
 - (b) record in writing the grant of the authorization, the terms and conditions (if any) upon which it is granted, and the reasons for the grant and for any terms and conditions.
- (4) An urgent authorization shall continue in effect until M receives notification –
 - (a) of the grant of a standard authorization in respect of P; or

- (b) that an assessment of P under this Part is negative, whichever first occurs, but in no case for longer than 28 days following the date of the authorization.
- (5) An urgent authorization may not be renewed, but a further urgent authorization may be granted where, following notification to M of a negative assessment, M considers that –
 - (a) a material change in P's circumstances; or
 - (b) a material mistake in the initial assessment of P, justifies a fresh application, and M applies to the Minister under paragraph (1) stating, as a ground for the application, a matter described in this paragraph.
- (6) Nothing in this Article shall be taken to permit the imposition of a significant restriction on P's liberty which conflicts with a valid advance decision to refuse treatment –
 - (a) made by P under Part 3; and
 - (b) of which M is aware.

43 Request for assessment

- (1) This Article applies where –
 - (a) P is resident, or is likely in the next 28 days to be resident, in a relevant place for the purpose of receiving care or treatment; and
 - (b) it appears to M that the conditions in paragraph (2) are fulfilled in respect of P.
- (2) The conditions mentioned in paragraph (1) are that it is likely –
 - (a) that P lacks capacity in relation to giving consent to the arrangements for his or her care or treatment in the relevant place; and
 - (b) that for the purposes of such care or treatment, P is or will be subject to a significant restriction on his or her liberty.
- (3) Where this Article applies, M must –
 - (a) unless paragraph (4) applies, notify the Minister of the matters in paragraphs (1) and (2); and
 - (b) in any event, make a request (in such form and manner, if any, as may be prescribed) for an assessment to be carried out in accordance with Article 44.
- (4) M is not obliged to notify the Minister of the matters in paragraph (1) and (2) if M reasonably believes that the Minister is already aware of those matters, but for the avoidance of doubt the admission of a person into guardianship does not prevent this Article applying.

44 Manner of assessment

- (1) The assessor appointed by the Minister under Article 41(2) must carry out an assessment in accordance with this Article and in a timely manner so as to enable a report to be provided within the time limit in Article 45(1)(b).
- (2) The assessment must be carried out by means of one or more interviews –
 - (a) with P; and
 - (b) in any case where –
 - (i) the assessor is not a registered medical practitioner, or
 - (ii) there is no medical evidence of P’s lack of capacity at the date of the assessment,with a registered medical practitioner, in accordance with paragraph (3), who has seen P immediately before the assessment.
- (3) For the purposes of paragraph (2)(b), the registered medical practitioner must be –
 - (a) the registered medical practitioner who is responsible for P’s care and treatment; or
 - (b) if there is no such practitioner as described in sub-paragraph (a), a registered medical practitioner designated by the Minister for the purpose.
- (4) The assessment may include interviews with or representations from such other persons, if any, as are listed in paragraph (5) and as may in the assessor’s view be appropriate.
- (5) The other persons mentioned in paragraph (4) are –
 - (a) P’s guardian, if any;
 - (b) any person on whom authority has been conferred by a health and welfare LPA;
 - (c) any delegate appointed by the Court with responsibility for matters relating to P’s health and welfare;
 - (d) any person otherwise nominated by P, if P has capacity to make such a nomination; and
 - (e) any other person who is P’s nearest relative.
- (6) The assessment must be such as will enable the assessor to form a view in respect of each of the following matters (the “capacity and liberty matters”), namely –
 - (a) whether P lacks capacity in relation to giving consent to the arrangements for his or her care or treatment in the relevant place;
 - (b) whether it is necessary to impose, as a component of that care or treatment, a significant restriction on P’s liberty in the interests of P’s health or safety;
 - (c) if so, whether it is in P’s best interests to be provided with care or treatment in circumstances where such a restriction will be imposed.
- (7) For the purpose of carrying out an assessment, the assessor –

- (a) shall be permitted at all reasonable times –
 - (i) to visit P in the relevant place,
 - (ii) to interview P either privately or, where there is in relation to P a person listed in paragraph (5), in the presence of that person, and
 - (iii) to inspect and take copies of all medical or other records relating to P and kept by the Minister, the Commission, M, or any other provider of care or treatment to P; and
 - (b) may interview or otherwise receive representations from M or any person listed in paragraph (5).
- (8) The States may by Regulations make further provision as to the conduct of assessments under this Part, including (without derogation from the generality of this power) provision as to –
- (a) the information which may be sought by assessors or to which they must have regard in carrying out assessments;
 - (b) persons who may be consulted by assessors for the purpose of carrying out assessments; and
 - (c) the content to be included by assessors in their reports.

45 Report of assessment

- (1) A report of an assessment must be provided to the Minister –
 - (a) in accordance with paragraphs (2) to (6); and
 - (b) no later than 21 days from the date of the appointment of an assessor under Article 41(2).
- (2) The report must be in writing and must –
 - (a) set out the assessor's view as to the capacity and liberty matters;
 - (b) state whether to the assessor's knowledge –
 - (i) a lasting power of attorney has been conferred on any person by P under Part 2, or
 - (ii) the Court has appointed any delegate to act for P under Part 4,in relation to decisions as to P's health and welfare, and if so identify the person or delegate concerned;
 - (c) state whether to the assessor's knowledge P has made an advance decision to refuse treatment under Part 3, and if so set out the terms of that decision;
 - (d) identify any persons such as are listed in Article 44(5) who have been consulted or interviewed by the assessor, and summarize the views of such persons as to the capacity and liberty matters; and
 - (e) subject to paragraphs (3) and (4), set out recommendations as to the nature and extent of any significant restrictions on P's liberty which, in all the circumstances, the assessor considers should be imposed.

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- (3) In forming a view as to the capacity and liberty matters and in making recommendations under paragraph (2)(e), the assessor must consider whether any proposed restrictions on P's liberty are a proportionate response to –
 - (a) the likelihood of P's suffering any harm; and
 - (b) the seriousness of that harm, should it occur.
 - (4) In addition to the matters to be included in the report under paragraph (2), a report may make such other recommendations in relation to P's care as appear to the assessor to be appropriate.
 - (5) Where P has made an advance decision to refuse treatment, an assessor may not recommend the imposition of any significant restriction on P's liberty which would be incompatible with the terms of that decision.
 - (6) Where –
 - (a) P is subject to guardianship under the Mental Health Law; and
 - (b) the assessor forms the view, in considering the matter under Article 44(6)(b), that it is necessary to impose a significant restriction on P's liberty,the report must also state whether it is considered that the restriction is one which may lawfully be imposed by P's guardian.
 - (7) Where to the assessor's knowledge there are, in relation to P, no such persons as are listed in Article 44(5), the report must contain a statement to this effect.
 - (8) Where the assessor has consulted or interviewed, in relation to P, any person listed in Article 44(5) –
 - (a) the assessor must inform that person of any recommendations made in relation to P; and
 - (b) if the assessor recommends that a significant restriction be imposed on P's liberty which is incompatible with a view expressed by that person, the assessor must explain in the report the specific reasons for that recommendation.
 - (9) A copy of the report must be provided to M, and may be provided to P, at the same time as any authorization based on the report, or, if no authorization is given, as soon as reasonably practicable.

46 Effect of report

- (1) If the report of an assessment is negative, no standard authorization may be granted under this Part, and no further assessment may be carried out unless –
 - (a) M considers that a material change in P's circumstances justifies a fresh application for assessment, and M makes a request to the Minister accordingly;
 - (b) M considers that an assessment of P was mistaken in a material respect and M informs the Minister of the mistake; or
 - (c) in the absence of a request under paragraph (a), the Minister otherwise becomes aware of a material change in P's

circumstances and considers that the change justifies a further assessment.

- (2) A report which is not affirmative as to each of the capacity and liberty matters is described in this Part as negative, and a report is also negative if –
 - (a) the assessment to which it relates did not enable the assessor to form a view as to the capacity and liberty matters; or
 - (b) where P is a person subject to guardianship under the Mental Health Law, all of the significant restrictions on P's liberty which are recommended by the report may, in the assessor's view, lawfully be imposed by P's guardian.
- (3) For the purposes of this Part a report is affirmative if in the assessor's view –
 - (a) P lacks capacity in relation to giving consent to the arrangements for his or her care or treatment in the relevant place;
 - (b) it is necessary to impose, as a component of that care or treatment, a significant restriction on P's liberty in the interests of P's health or safety; and
 - (c) it is in P's best interests to be provided with care or treatment in circumstances where such a restriction will be imposed.

47 Record of assessments etc.

The Minister must keep, in such manner and for such period as may appear to the Minister to be necessary, a record of –

- (a) all assessments carried out; and
- (b) all authorizations granted,

under this Part, together with copies of reports of all such assessments.

48 Standard authorizations

- (1) This Article applies where the Minister is satisfied that –
 - (a) an assessment of P has been duly completed in accordance with Articles 44 and 45; and
 - (b) the report of the assessment is affirmative.
- (2) Where this Article applies, the Minister may authorize the imposition of significant restrictions on P's liberty for a period of no longer than 12 months beginning with the authorization.
- (3) As soon as practicable following an authorization under paragraph (2) (a "standard authorization"), the Minister must give notice in writing of the authorization to the assessor and to M, and a code of practice under Article 68 may make further provision as to the form and content of the authorization to be given under paragraph (2), but such authorization must at least specify –
 - (a) P's name;

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- (b) M's name and the name of any other registered person concerned;
 - (c) the date (or if applicable, the occurrence of such event) on which, and the period during which, the authorization is to take effect;
 - (d) having regard to Article 45(2)(e), the nature and extent of the significant restrictions on P's liberty which are permitted to be imposed by the authorization; and
 - (e) any conditions or directions relating to the imposition of such restrictions.
- (4) Despite paragraph (3)(d) the Minister may authorize significant restrictions to be imposed on P's liberty which are different (whether in specific respects or by their nature) to any such restrictions as may have been recommended by the assessor.
- (5) Where the Minister considers it is in P's best interests to do so, the Minister may authorize a significant restriction which conflicts with a decision of –
- (a) a person on whom P has conferred a lasting power of attorney under Part 2; or
 - (b) a delegate appointed by the Court under Part 4,

but nothing in this Article shall be taken to permit the Minister to authorize a significant restriction on P's liberty which conflicts or would conflict with a valid advance decision made by P under Part 3.

49 Rectification etc. of reports and recommendations

- (1) Where it appears to the Minister or to M that the report of an assessment is incorrect or defective –
- (a) the error or defect in question may be rectified –
 - (i) by the Minister, or
 - (ii) with the consent of the Minister, by the assessor who made the report; and
 - (b) the report shall have effect (and be deemed to have had effect) as though made originally without the error or defect.
- (2) Without prejudice to paragraph (1), if it appears to the Minister that a recommendation in any report of an assessment is insufficient to warrant the imposition of a significant restriction on P's liberty, the Minister must as soon as reasonably practicable give notice in writing –
- (a) to the assessor, of the insufficiency; and
 - (b) to M, of the fact that the recommendation is to be disregarded.
- (3) Where notice is given under paragraph (2), the report which contained the recommendation shall nevertheless be deemed to be (and always to have been) sufficient if –
- (a) a fresh recommendation made in accordance with Article 45(2)(e) and which is not defective in any respect is provided to the Minister within the period of 14 days beginning with the date on which the notice was given; and

- (b) that recommendation, taken together with any other recommendation relating to the same assessment, is sufficient to warrant the imposition of the significant restriction.

50 P to be notified of authorization etc.

- (1) As soon as practicable following the grant of any authorization, M must take all such steps as are reasonable to ensure that P understands –
 - (a) the effect of the authorization in relation to P, and in particular the nature and extent of the significant restriction on P's liberty which is authorized by it; and
 - (b) the rights of advocacy, support, representation and review which are available to P under this Law in respect of the authorization.
- (2) As soon as practicable following a negative assessment or the termination of any authorization, M must take all such steps as are reasonable to ensure that P understands the effect of that assessment or (as the case may be) termination in relation to P.
- (3) The steps to be taken under paragraphs (1) and (2) include giving the information required by that paragraph both in writing (and where appropriate, this may include giving to P a copy of the report of the relevant assessment) and orally, having regard to P's ability to understand that information, however given.
- (4) Subject to paragraph (5), at the same time as or within a reasonable time of giving information to P under paragraph (1) or (2), M must also take all such steps as are reasonable to provide the same information to any person known to M who is, in relation to P, a person such as listed in Article 44(5).
- (5) Where, at the time information is given to P under paragraph (1) or (2), no independent capacity advocate has been appointed in respect of P by the Minister under Article 51, the information must be given to any advocate so appointed as soon as practicable following his or her appointment.

51 Advocates to be appointed

- (1) This Article applies where, in respect of P –
 - (a) the report on an assessment contains a statement such as mentioned in Article 45(7); and
 - (b) a standard authorization has been granted.
- (2) Where this Article applies the Minister must, as soon as practicable after granting the authorization, nominate an independent capacity advocate to represent P.
- (3) The Minister must satisfy him or herself that any person to be nominated as an independent capacity advocate under this Article is a fit and proper person to be so nominated, in accordance with Part 6 and with any further provision made by Regulations under that Part as to such nominations.

- (4) The nomination of an independent capacity advocate under this Article –
 - (a) shall be without prejudice to the continuing authority of any person on whom such authority has been conferred by P under a lasting power of attorney or of any delegate appointed by the Court; and
 - (b) shall continue for the duration of the authorization, and if any vacancy arises the Minister must immediately appoint another person in accordance with this Article and any Regulations such as mentioned in paragraph (3).

52 Renewal of standard authorization

- (1) A standard authorization may not be renewed except in accordance with this Article.
- (2) This Article applies where, within the period of 28 days ending with the date on which, unless it were renewed, a standard authorization would expire, M considers that it is necessary to continue to impose a significant restriction on liberty authorized by the standard authorization.
- (3) Where this Article applies M must give notice requesting a renewal –
 - (a) to the Minister, in such form as may be prescribed for the purpose; and
 - (b) no later than the end of the period mentioned in paragraph (2).
- (4) Where the Minister receives a request duly made under paragraph (3), the Minister must as soon as practicable appoint an assessor to carry out a further assessment of P (a “renewal assessment”).
- (5) Articles 44 to 51 shall apply to a renewal assessment as though references in those Articles to an assessment were to a renewal assessment, except that Article 44(6)(a) shall apply as though for the words “whether P lacks capacity” in that sub-paragraph there were substituted the words “whether P continues to lack capacity”.
- (6) If the report of a renewal assessment is affirmative, the Minister –
 - (a) may, if satisfied that it is appropriate to continue the significant restriction on liberty, renew the standard authorization; and
 - (b) may do so with or without variation, in accordance with any fresh recommendation made by the assessor under Article 45(2)(e).

53 Standard authorization: review by manager

- (1) Where a standard authorization is in effect, M must keep under review the necessity for the significant restriction on P’s liberty which it authorizes.
- (2) Paragraph (3) applies if, at any time during the period for which a standard authorization is in effect, it appears to M that –
 - (a) P has regained capacity in relation to the question of how his or her care should be provided, and does not consent to a restriction authorized by the standard authorization; or
 - (b) it is no longer –

- (i) necessary in the interests of P's health or safety, or
 - (ii) in P's best interests,
- to continue to impose a restriction so authorized.
- (3) Where this paragraph applies, M must cease to impose the significant restriction, and shall inform the Minister of that fact and of the date on which the restriction ceased to be imposed.

54 Continuity of authorization: changes of place and in management

- (1) Where P is to be moved from the relevant place to which an authorization (including an order of the Court) under this Part relates (the "first relevant place"), to another relevant place (the "new place"), the manager of the first relevant place must notify the Minister of the proposed change.
- (2) Following notification under paragraph (1), 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.
- (3) Where one person ceases to be the manager (the "original manager") of a relevant place in relation to which an authorization has effect, and a different person (the "new manager") has that function, the change shall take effect as described in paragraph (4).
- (4) For the purposes of the authorization and of this Part –
 - (a) anything done by or in relation to the original manager in connection with the authorization has effect as if done by or in relation to the new manager;
 - (b) anything which is in the process of being done by or in relation to the original manager may be continued by or in relation to the new manager.
- (5) But solely by virtue of this Article the original manager does not cease to be, and the new manager does not become, liable for anything done in relation to the authorization by the original manager prior to the substitution.

55 Review of authorizations by Tribunal

- (1) A request for a review of an authorization may be made to the Tribunal –
 - (a) in accordance with paragraph (2);
 - (b) by an application for the purpose made by –
 - (i) P, or a person who is listed in Article 44(5) on behalf of P,
 - (ii) an independent capacity advocate nominated to represent P under Article 51,
 - (iii) the Minister, or
 - (iv) the Attorney General.
- (2) During the period for which an authorization is in effect, no more than one application may be made under paragraph (1), whether by or on behalf of P.

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- (3) The Minister may by Order –
 - (a) make further provision as to the form and manner of application to be made under paragraph (1);
 - (b) make provision as to the conduct of proceedings before the Tribunal following receipt by the Tribunal of such an application; and
 - (c) without prejudice to paragraph (4) or(5), make further provision as to the powers of the Tribunal in dealing with the application and carrying out its review.
 - (4) Following receipt of a request under paragraph (1) the Tribunal must review –
 - (a) the standard authorization;
 - (b) the reports of relevant assessments; and
 - (c) such other information as the Tribunal may consider relevant (including but not limited to, any matters as to which the Minister may make provision under paragraph (3)).
 - (5) Following its review of the matters specified in paragraph (4) the Tribunal must –
 - (a) make a fresh determination as to the capacity and liberty matters; and
 - (b) determine –
 - (i) whether the significant restrictions on P’s liberty authorized by the standard authorization should remain in effect, and
 - (ii) if so, for what period.
 - (6) For the purposes of this Article the Tribunal may make orders –
 - (a) amending or revoking an authorization; and
 - (b) whether or not it considers that an authorization should continue to have effect, directing the Minister to carry out such further assessments as the Tribunal considers necessary.

56 Monitoring of authorizations

- (1) The Minister may do all such things as are reasonably necessary for the purposes of monitoring –
 - (a) the application and use of authorizations; and
 - (b) the operation of significant restrictions on liberty authorized by them.
- (2) In particular for the purpose mentioned in paragraph (1), and without derogation from the generality of that purpose, the Minister may by Order make provision requiring the Commission, M, or any registered person concerned to disclose to the Minister such information as may be prescribed.
- (3) The Minister may also make further provision by way of a code of practice under Article 68, as to the operation of the provisions of this Part and as to records which must be kept in relation to such operation.

57 Powers of Court in relation to grant etc. of authorizations

- (1) Without derogation from any other power conferred on the Court by this Law or any other enactment, or by its inherent jurisdiction, the Court may, if the conditions stated in paragraph (2) are fulfilled, make an order authorizing the imposition of a significant restriction on P's liberty.
- (2) The conditions mentioned in paragraph (1) are –
 - (a) that P lacks capacity in relation to giving consent to the arrangements for his or her care or treatment; and
 - (b) that it is both necessary in the interests of P's health or safety, and in P's best interests, to impose significant restrictions on P's liberty.
- (3) An order of the Court under paragraph (1) must state –
 - (a) P's name;
 - (b) M's name, and the name of any registered person concerned;
 - (c) the name of any registered provider within the meaning of the Registration of Care (Jersey) Law 2014⁶;
 - (d) the period (of no more than 12 months) during which the order is to have effect;
 - (e) the nature, extent and duration of the significant restrictions on P's liberty which are permitted to be imposed by the order, and by whom they may be imposed;
 - (f) any conditions or directions in relation to the imposition of any such significant restriction (in particular, but not limited to, directions as to the frequency of review); and
 - (g) the full grounds for the Court's decision, with regard in particular to paragraph (2) and sub-paragraphs (d) to (f) of this paragraph.
- (4) In its determinations as to the matters described in paragraph (3)(d) to (f), the Court must have particular regard to the medical evidence available before it.
- (5) The Court may authorize significant restrictions on P's liberty which differ from any such restrictions as may have been recommended under any other provision of this Part.
- (6) Nothing in this Article shall be taken to permit the Court to authorize a significant restriction on P's liberty which conflicts or would conflict with a valid advance decision made by P under Part 3.
- (7) Where the Court considers it is in P's best interests to do so, the Court may authorize a significant restriction which conflicts with a decision of –
 - (a) a person on whom P has conferred a lasting power of attorney under Part 2; or
 - (b) a delegate appointed by the Court under Part 4.
- (8) Articles 50, 51, 54, 56 and 60 shall apply with all necessary modifications to an order of the Court under this Article as they apply in relation to a standard authorization.

58 Appeals

- (1) A person aggrieved by a decision of the Tribunal may appeal to the Court against that decision on a point of law.
- (2) The power to make rules of Court under the Royal Court (Jersey) Law 1948⁷ shall extend to making rules for the purpose of the conduct of, and proceedings in, appeals under paragraph (1).
- (3) On an appeal under paragraph (1) the Court may –
 - (a) quash the decision against which the appeal is made;
 - (b) affirm the decision;
 - (c) give any direction which the Tribunal has power to give; or
 - (d) refer the matter back to the Tribunal for reconsideration.
- (4) No decision of the Tribunal shall be invalidated solely by reason of procedural irregularity, unless that irregularity was such as to prevent a party to the proceedings from presenting his or her case fairly before the Tribunal.

59 Temporary restriction of liberty for purpose of life-sustaining treatment

- (1) Notwithstanding the preceding provisions of this Part, a person (“D”) may impose a significant restriction on P’s liberty where the restriction is necessary in the interests of P’s health or safety as described in paragraph (2), for the duration of any treatment or act mentioned in that paragraph.
- (2) For the purposes of paragraph (1), a restriction shall be considered to be necessary in the interests of P’s health and safety if –
 - (a) the restriction is wholly or partly for the purpose of, and consists wholly or partly of –
 - (i) giving P life-sustaining treatment, or
 - (ii) doing any act which D reasonably believes to be necessary to prevent a serious deterioration in P’s condition;and
 - (b) the restriction is necessary in order to give that treatment or do that act.

60 Authorization as authority to take and convey P

An authorization (including an order of the Court) under this Part shall be sufficient authority, at any time within the period of 72 hours beginning with the time at which the authorization is given –

- (a) for M or any other person authorized by M for the purpose to take P and convey him or her to the relevant place; and
- (b) for M to admit P and detain him in the relevant place for such period as may be specified in the authorization.

PART 6

INDEPENDENT CAPACITY ADVOCATES

61 Application of this Part, and interpretation

- (1) This Part applies to make provision for the appointment of independent capacity advocates –
 - (a) to represent and support any person lacking capacity in respect of certain decisions (“P”), as further provided by Articles 64 and 65;
 - (b) to carry out such other functions as are described in Article 63 and as provided by Regulations made under that Article; and
 - (c) for the purposes of Part 5 as provided by Article 51.
- (2) In this Part –

“advocate” means an independent capacity advocate appointed under Article 62; and

“M” means the Minister and any other person having responsibility for P’s care or treatment.

62 Appointment of independent capacity advocates

- (1) The States may by Regulations require the Minister to make such arrangements for the appointment of advocates –
 - (a) as are in accordance with provision made by the Regulations and further described in paragraphs (2) and (3); and
 - (b) as the Minister, having regard to paragraph (4), may consider reasonable.
- (2) Regulations under paragraph (1) may in particular make provision including (but not limited to) provision –
 - (a) as to the qualifications to be required of persons who may be appointed;
 - (b) as to the procedure for appointment and terms and conditions of appointment;
 - (c) requiring M to report to the Commission on any concerns arising from the dealings between P and P’s independent capacity advocate;
 - (d) as to the circumstances in which the appointment may end or be terminated and the formalities for doing so; and
 - (e) as to the nature and level of payments (whether by way of fees, or reimbursement of expenses) which may be made to advocates.
- (3) For the purpose of enabling advocates to carry out their functions, Regulations may further make provision as to the powers of advocates –
 - (a) to interview P and any other of P’s representatives; and
 - (b) to examine and take copies of any documents, records or other information kept by the Minister, the Commission or the manager

of a relevant place, which may be relevant to the exercise of a function by an advocate.

- (4) In making arrangements under paragraph (1), the Minister must have regard to the principle that P should, so far as practicable, be represented and supported by a person who is independent of any person who is responsible for a proposed act or decision relating to P.

63 Functions of independent capacity advocates

- (1) The functions to be carried out by advocates include (but are not limited to) –
 - (a) providing support to P so that P may participate as fully as possible in any decision concerning P or P's best interests;
 - (b) obtaining and evaluating information in relation to representing and supporting P and P's best interests;
 - (c) ascertaining what, if P had capacity, would be P's wishes and feelings in relation to particular matters, or would be the beliefs and values likely to influence P;
 - (d) obtaining further medical opinion about proposed medical treatment of P; and
 - (e) ascertaining what courses of action may be available in relation to P, in addition or in the alternative to any such proposed treatment.
- (2) The States may by Regulations –
 - (a) further make provision as to circumstances in which advocates may challenge, or provide assistance for the purpose of challenging, any decision under this Law affecting P or P's best interests; and
 - (b) amend paragraph (1).

64 Support where serious medical treatment is proposed

- (1) This Article applies where –
 - (a) M proposes to provide, or secure the provision of, serious medical treatment for P;
 - (b) P lacks capacity to consent to the proposed treatment; and
 - (c) M is satisfied that there is no person, other than one engaged in a professional capacity or for remuneration in providing care or treatment for P, whom it would be appropriate to consult in determining whether the proposed treatment would be in P's best interests.
- (2) Where this Article applies, M must, subject to paragraph (3), instruct an advocate to represent P before the proposed treatment may be provided.
- (3) If, in the opinion of M, the proposed treatment needs to be provided as a matter of urgency, it may be provided even though the requirement in paragraph (2) has not been fulfilled.

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- (4) In providing or securing the provision of treatment for P, M must take into account any information given or submissions made on behalf of P by the advocate instructed under paragraph (2).
 - (5) For the purposes of this Article “serious medical treatment” means treatment of a kind which involves providing, withholding or withdrawing treatment in circumstances where –
 - (a) in a case where a single treatment is proposed, there is a fine balance between the potential benefit to P of such treatment and the burdens and risks it is likely to entail;
 - (b) in a case where there is a choice of treatments, a decision as to which treatment to use is finely balanced; or
 - (c) the proposed treatment would be likely to involve serious consequences for P.
 - (6) The States may by Regulations amend the definition in paragraph (5).

65 Support where provision of or change in accommodation is proposed

- (1) This Article applies where M proposes to make arrangements –
 - (a) for the provision of accommodation for P in a hospital, or in an approved care home as defined by Article 1 of the Long-Term Care (Jersey) Law 2012⁸ (including a change to any existing provision of accommodation for P);
 - (b) P lacks capacity to consent to such arrangements; and
 - (c) M is satisfied that there is no person, other than one engaged in a professional capacity or for remuneration in providing care or treatment for P, whom it would be appropriate to consult in determining whether the proposed arrangements would be in P’s best interests.
- (2) This Article does not apply –
 - (a) where P is accommodated as a result of an obligation imposed under the Mental Health Law; or
 - (b) where P is a person in respect of whom Article 51 applies.
- (3) Where this Article applies, M must instruct an advocate to represent P before making the proposed arrangements, unless –
 - (a) the accommodation is likely to be provided for a continuous period which is less than the applicable period; or
 - (b) the proposed arrangements need to be made as a matter of urgency.
- (4) If either of the grounds in paragraph (3)(a) or (b) apply, but M subsequently has reason to believe that the accommodation is likely to be provided for a continuous period –
 - (a) beginning with the day on which accommodation is first provided in accordance with the proposed arrangements; and
 - (b) ending on or after the expiry of the applicable period,M must instruct an advocate to represent P.

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- (5) In making arrangements for P's accommodation or a change in P's accommodation, M must take into account any information given or submissions made on behalf of P by the advocate instructed under paragraph (3) or (4).
 - (6) For the purposes of this Article the "applicable period" means –
 - (a) in relation to accommodation in a hospital, 28 days; and
 - (b) in relation to accommodation in an approved care home, 8 weeks.

PART 7

MISCELLANEOUS AND GENERAL PROVISIONS

66 Research involving persons lacking capacity

- (1) The States may by Regulations make provision as to the extent to which, and the circumstances in which, it may be lawful to conduct intrusive research involving, or in relation to, a person ("P") who lacks capacity to consent to such research.
- (2) Except as provided by Regulations under paragraph (1), it shall not be lawful to conduct such research.
- (3) In making Regulations under paragraph (1) the States must have regard to the principles that no research shall be lawful unless –
 - (a) it is safe and produces or may produce a benefit to P which outweighs any risk to, or burden upon, P; or
 - (b) where the purpose of the research is to improve medical or scientific knowledge, it is of minimal risk to P and can be carried out with minimal intrusion to P's physical and mental well-being and legal rights.
- (4) Regulations under paragraph (1) must in particular (but without limitation) make provision as to –
 - (a) the establishment or appointment of a body for the purpose of approving and monitoring intrusive research;
 - (b) the nature or types of research which are considered intrusive for the purposes of this Article;
 - (c) the circumstances which may make any research intrusive within the meaning given by Regulations or for the purposes of this Article;
 - (d) the requirements which must be met for approval of any intrusive research;
 - (e) the consultation of carers for, or representatives of, persons who may be subject to intrusive or potentially intrusive research, including the circumstances in which such consultation must take place and the matters or information which must be disclosed or to which such consultation must relate;

- (f) the termination of any approved research, including (but not limited to) the circumstances in which, and steps which must be taken where, a person is to be withdrawn from that research;
- (g) the safeguards which must apply to, and in the course of, any intrusive research;
- (h) the circumstances, if any, in which research to which a person has consented may continue to be conducted where that person subsequently loses capacity so to consent.

67 Offence of wilful neglect

- (1) It is an offence for any person who –
 - (a) has the care of another person (“P”); or
 - (b) is appointed –
 - (i) by P, under a lasting power of attorney under Part 3, or
 - (ii) as P’s delegate under Part 4,to ill-treat or wilfully neglect P.
- (2) For the purposes of paragraph (1)(a), a person has the care of P if the person is responsible for giving P any health or social care as part of an activity which is a regulated activity under Article 2 of the Regulation of Care (Jersey) Law 2014⁹.
- (3) A person guilty of an offence under this Article shall be liable to imprisonment for a term of 5 years and a fine.

68 Codes of practice

- (1) The Minister must issue a code of practice for the purposes of this Law and in particular (but without limitation) –
 - (a) for the guidance of –
 - (i) assessors under Part 5 or any other persons having a similar duty under this Law or the Mental Health Law to assess whether or not a person has, or (as the case may be) lacks capacity in relation to any matter,
 - (ii) any person acting under this Law in connection with the care or treatment of any other person,
 - (iii) any person on whom authority is conferred by lasting power of attorney under Part 2,
 - (iv) delegates appointed by the Court under Part 4,
 - (v) independent capacity advocates in the exercise of functions conferred on them under Part 6,
 - (vi) any person carrying out research authorized by any provision made under Article 66;
 - (b) with respect to such other matters, arising out of this Law, as the Minister may think fit.

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- (2) A person must have regard to any relevant code of practice under paragraph (1) where that person is acting, in relation to another person who lacks capacity –
 - (a) under authority conferred by a lasting power of attorney;
 - (b) as a delegate appointed by the Court;
 - (c) in reliance on any provision made under Article 66;
 - (d) as an independent capacity advocate;
 - (e) in the exercise of functions under Part 5 relating to significant restrictions on liberty;
 - (f) in a professional capacity; or
 - (g) for remuneration.
 - (3) Paragraph (4) applies where it appears to the Court or to the Tribunal, when conducting any civil or criminal proceedings, that –
 - (a) a provision of a code issued under this Article; or
 - (b) a failure to comply with a requirement of any such code,is relevant to a question arising in those proceedings.
 - (4) Where this paragraph applies, the relevant provision or failure must be taken into account in determining the question, but a failure to comply with a code shall not of itself make a person liable to any civil or criminal proceedings.
 - (5) The Minister may amend a code from time to time as the Minister may see fit, and a code may make, as respects any matter in relation to which it makes provision –
 - (a) the same provision for all cases, or different provision for different cases or classes of case, or different provision for the same case or class of case for different purposes; and
 - (b) any such provision either unconditionally or subject to any specified conditions.
 - (6) Before issuing or amending a code, the Minister must consult such bodies as appear to the Minister to be concerned.
 - (7) The Minister must publish any code which is for the time being in force in such manner as may appear to the Minister to be appropriate for bringing it to the attention of persons likely to be concerned with or affected by its provisions.

69 Regulations

- (1) The States may by Regulations make provision for the purpose of giving full effect to this Law and, in particular but without derogation from the generality of this power, such Regulations –
 - (a) may make provision for or in respect of any matter that by this Law is required or permitted to be done by Regulations;
 - (b) may consequentially amend any enactment; and
 - (c) may make provision for the purpose of giving full effect in Jersey to any international agreement concerning the protection of adults.

- (2) Regulations made under this Law may make all such transitional, saving, incidental, consequential or supplementary provision as may appear to the States to be necessary or expedient for the purposes of the Regulations.

70 Orders

- (1) The Minister may make Orders –
 - (a) for prescribing anything which is required or authorized to be prescribed under this Law; and
 - (b) making transitional provision in relation to the commencement of this Law.
- (2) Orders made by the Minister under paragraph (1) may, in particular but without derogation from the generality of that power –
 - (a) prescribe the form of any application, recommendation, report, notice or other document to be made, given or provided under this Law;
 - (b) prescribe the manner in which any such document as mentioned in paragraph (a) may be served, and proved in evidence;
 - (c) make provision for the amount of any fees or the level of any charges required to be paid under this Law; and
 - (d) make all such transitional, saving, supplementary and consequential provision as may appear to the Minister to be necessary or appropriate.
- (3) The Subordinate Legislation (Jersey) Law 1960¹⁰ shall apply to Orders made under paragraph (1)(a).

71 Rules of Court

The power to make rules of court under the Royal Court (Jersey) Law 1948¹¹ includes power to make rules regulating practice and procedure in or in connection with proceedings before the Court under this Law, and in particular (but without derogation from the generality of this power) to make rules as to –

- (a) applications under Parts 2, 3, 4 or 5 (including as to the hearing and determination of applications otherwise than in open court);
- (b) the admission of any matters in evidence, and evidential presumptions; and
- (c) the joinder of any persons as parties.

72 Repeal

Any customary law of Jersey concerning *curatelles* shall cease to have effect.

73 Citation and commencement

This Law may be cited as the Capacity and Self-Determination (Jersey) Law 201- and shall come into force on such day or days as the States may by Act appoint.

SCHEDULE

(Article 13)

PART 1**EXECUTION OF LASTING POWER OF ATTORNEY****1 Form and execution of LPA**

- (1) An instrument conferring a lasting power of attorney must be in such form as may be prescribed, and must include –
 - (a) a statement made and signed by the person conferring authority (“P”), attesting that –
 - (i) P has read and understood such information, about the effect of the LPA, as may be prescribed, and
 - (ii) P intends the authority conferred by the LPA to include authority to make decisions on P’s behalf in circumstances where P no longer has capacity to make them;
 - (b) a statement made and signed by each person on whom authority is conferred (“A”), attesting that –
 - (i) A has read and understood such information, about the effect of the LPA, as may be prescribed, and
 - (ii) A understands that the duties imposed by the LPA must be carried out in the light of Articles 3 (principles to be applied) and 6 (best interests); and
 - (c) in relation to each of the statements mentioned in clauses (a) and (b), a statement made and signed by a person of a prescribed description (“W”) who is neither P nor A, attesting –
 - (i) that W has witnessed the execution of the instrument by P and A or by either P or A, as the case may be, and
 - (ii) where W has witnessed the execution of the instrument by P, to the matters in sub-paragraph (2).
- (2) The matters to which W must attest as mentioned in clause (1)(c) are that in W’s opinion –
 - (a) at the time of P’s execution of the instrument, P understands the purpose of the LPA and the scope of the authority it confers;
 - (b) no fraud or undue pressure is being used to induce P to confer such authority or execute the LPA; and
 - (c) there is nothing else which would prevent a valid power from being conferred in the case.
- (3) In clauses (1)(a) and (b), a reference to reading information includes receiving information by any means (such as, but without limitation, aurally or by the use of Braille) by which that information may be communicated effectively.

2 Power of Minister to prescribe information and guidance

Where a form is prescribed under paragraph 1, the Minister –

- (a) must prescribe the information mentioned in sub-paragraphs (1)(a) and (b) of that paragraph; and
- (b) may prescribe guidance to assist those executing an instrument creating a lasting power of attorney.

PART 2**REGISTRATION OF LASTING POWER OF ATTORNEY****1 Application for registration**

- (1) A lasting power of attorney is not created, and no such power may be validly exercised, until the instrument purporting to create it is registered in accordance with this Part of this Schedule.
- (2) An application for registration must be made to the Judicial Greffe –
 - (a) in the prescribed form, and including the instrument and all such other information as may be prescribed;
 - (b) by P or by A; and
 - (c) accompanied by the prescribed fee.
- (3) Where the instrument confers authority on more than one person to act jointly and severally, “A” in sub-paragraph (2)(b) means any one of the persons on whom authority is so conferred.
- (4) A person who, in an application under this paragraph, makes a statement which the person knows to be false in a material particular, is guilty of an offence and liable upon conviction to imprisonment for a term of 2 years and a fine.

2 Notification of application

As soon as practicable after receiving an application under paragraph 1 of this Part, the Judicial Greffe must give notice of the application, in the prescribed form, to each of the persons who made and signed a statement as described in paragraph 1(1)(a) and (b) of Part 1 of this Schedule.

3 Registration

- (1) Subject to this paragraph and paragraphs 4 to 6 of this Part of this Schedule, the Judicial Greffe must register the lasting power of attorney no later than the end of the period prescribed for this purpose.
- (2) If it appears to the Judicial Greffe that –
 - (a) the instrument is not made in accordance with paragraph 1 of Part 1 of this Schedule; or

- (b) the instrument contains a provision which would be ineffective or would otherwise prevent the creation or operation of a valid lasting power of attorney,

the Judicial Greffe must not register a lasting power of attorney and must as soon as practicable return the form to the applicant together with a statement of reasons why no lasting power of attorney has been registered.

- (3) In a case to which sub-paragraph (2) applies, an application may be made to the Court under Article 19 or 20 for its determination of the matter, and sub-paragraph (4) shall apply where the Court determines that the instrument contains a provision which –
- (a) would be ineffective as part of a lasting power of attorney; or
- (b) would otherwise prevent the creation or operation of a valid lasting power of attorney.
- (4) Where this sub-paragraph applies, the Court must –
- (a) sever the provision, and notify the Judicial Greffe that it has done so; or
- (b) direct the Judicial Greffe not to register the instrument as creating a lasting power of attorney.
- (5) Where the Judicial Greffe is notified by the Court that a provision has been severed, the Judicial Greffe must register the instrument with a note to that effect attached to it.

4 Delegate already appointed

Where it appears to the Judicial Greffe that –

- (a) there is already a delegate appointed by the Court for P; and
- (b) the authority to be conferred on A would, if the lasting power of attorney were registered, conflict with the powers conferred on the delegate,

the Judicial Greffe must not register the instrument unless directed to do so by the Court.

5 Objections to registration

- (1) A person may give notice of an objection to registration of an instrument –
- (a) to the Judicial Greffe;
- (b) before the end of the prescribed period,
- on any of the grounds listed in sub-paragraph (2).
- (2) The grounds mentioned in sub-paragraph (1) are that –
- (a) a declaration of bankruptcy has revoked a property and affairs LPA, under Article 17(3);
- (b) an event listed in Article 17(5) has occurred which has revoked the lasting power of attorney;

- (c) fraud, or undue pressure, was used to induce P to execute the instrument; or
 - (d) the instrument was not made in accordance with Part 1 of this Schedule.
- (3) If the Judicial Greffe is satisfied that the ground for making the objection is established, the instrument is not to be registered unless the Court, on the application of the person applying for registration –
- (a) is satisfied that the ground is not established; and
 - (b) directs the Judicial Greffe to register the instrument as creating a lasting power of attorney.

6 Notification of registration

Where an instrument is registered under this Schedule, the Judicial Greffe must give notice of the fact in the prescribed form to P and to A.

7 Evidence of registration

A document provided by the Judicial Greffe and purporting to be a copy of an instrument registered under this Schedule is, in Jersey, evidence of –

- (a) the contents of the instrument; and
- (b) the fact that it has been registered as creating a lasting power of attorney.

8 Cancellation of registration

- (1) Where registration of an instrument as creating a lasting power of attorney has taken place, the registration may be cancelled only –
- (a) by the Judicial Greffe, in accordance with sub-paragraph (2); or
 - (b) by the Court, in accordance with sub-paragraph (3),
- and by no other means.
- (2) Where, after an instrument has been registered, the Judicial Greffe is satisfied that –
- (a) P, having capacity to do so, has revoked the lasting power of attorney; or
 - (b) any of the grounds listed in paragraph 5(2) of this Part has been established,
- the Judicial Greffe must cancel the registration and must notify P and A of the fact of the cancellation.
- (3) The Court must direct the Judicial Greffe to cancel a registration of an instrument as creating a lasting power of attorney where the Court –
- (a) determines under Article 19(1)(a) that one or more of the requirements for the creation of a lasting power of attorney have not been met;
 - (b) determines under Article 19(1)(b) that a lasting power of attorney has been revoked or has otherwise come to an end; or

- (c) revokes a lasting power of attorney under Article 19(3).
- (4) Sub-paragraph (5) applies where the Court determines that the instrument contains a provision which –
 - (a) would be ineffective as part of a lasting power of attorney; or
 - (b) would otherwise prevent the creation or operation of a valid lasting power of attorney.
- (5) Where this sub-paragraph applies, the Court must –
 - (a) sever the provision, and notify the Judicial Greffe that it has done so; or
 - (b) direct the Judicial Greffe to cancel the registration of the instrument as creating a lasting power of attorney.
- (6) Where the Judicial Greffe is notified by the Court that a provision has been severed, the Judicial Greffe must attach a note to the instrument to that effect.

9 Records of alterations to registered LPAs

- (1) Where, in the case of a registered instrument, it appears to the Judicial Greffe that –
 - (a) a lasting power of attorney is revoked, or suspended, in whole or in part in relation to P's property and affairs (but not in relation to other matters);
 - (b) an event has occurred which has terminated A's appointment, but has not revoked a lasting power of attorney; or
 - (c) A has been replaced by a substitute under the terms of the instrument,the Judicial Greffe must attach a note to the instrument to that effect.
- (2) In any case where the Judicial Greffe attaches a note to an instrument under the provisions of this Part, the Judicial Greffe must give notice of doing so to A (and in a case where more than one person is appointed as A, to each of them).

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- 1 P.78/2016*
2 chapter 26.600
3 chapter 20.820
4 chapter 26.600
5 chapter 20.820
6 chapter 20.820
7 chapter 07.770
8 chapter 26.600
9 chapter 20.820
10 chapter 15.720
11 chapter 07.770