STATES OF JERSEY

OFFICIAL REPORT

WEDNESDAY, 14th SEPTEMBER 2016

[9:30]

The Roll was called and the Dean led the Assembly in Prayer.

PUBLIC BUSINESS – resumption

1. Draft Capacity and Self-Determination (Jersey) Law 201- (P.79/2016)

The Bailiff:

We now return to the agenda. The next item is the Draft Capacity and Self-Determination (Jersey) Law 201-, P.79/2016, lodged by the Minister for Health and Social Services. As I indicated yesterday, for reasons of convenience, I will ask the Greffier to preside.

The Greffier of the States (in the Chair):

So we now come to the Draft Capacity and Self-Determination (Jersey) Law 201-. I ask the Greffier to read the citation.

The Deputy Greffier of the States:

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 authorisations for the proper care and management of such individuals; to make provision relating to anticipatory instructions refusing treatment; and for connected purposes. The States, subject to the sanction of Her Most Excellent Majesty in Council, have adopted the following Law.

The Greffier of the States (in the Chair):

Minister?

1.1 Senator A.K.F. Green (The Minister for Health and Social Services):

This Assembly will be aware that the issues in relation to capacity and decision making have the potential to affect everyone. A person's capacity to make some decisions may be impaired for a number of different reasons such as having a significant learning difficulty, a mental health problem, suffering stroke or head injury, dementia onset or substance misuse. This new legislation is part of a programme of initiatives that will raise the standards of care here in Jersey. It will safeguard the dignity and wellbeing of people who do not, or may not, have capacity to make decisions for themselves. It will enable them to make their own decisions, though, wherever possible. It will also ensure that when a person lacks a capacity to make a decision that there are appropriate people and procedures in place to support them and to ensure that at all times the decision that is made is in the person's best interest. Why do we need, then, a new Capacity and Self-Determination Law? The Capacity and Self-Determination Law draws inspiration from the Mental Capacity Act 2005 in the U.K. (United Kingdom) and builds on the applicable policies and principles of customary law. 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. This law breaks new ground in Jersey in a number of different domains. While we have had various States of Jersey policies and aspects of existing law that are relevant in relation to capacity, there has been no specific legislation to protect someone whose decision making had become impaired. This draft law has been prepared in conjunction with the Mental Health Law which we debated yesterday which has allowed for continuity. We have ensured that these 2 pieces of legislation dovetail and complement one another. It is intended that the capacity law should apply to any decision affecting a person who may not have capacity such that it may apply to decisions about how a person may be cared for and the medical treatment that they will receive. It will also

apply to day-to-day decisions about how people live their lives and manage their finances. The law not only safeguards the rights, dignity and wellbeing of people who may have lost capacity to make that decision for themselves but it also provides an assurance that the person will be supported to make a decision for themselves whenever possible and will have decisions made at all times in their best interest where it is not possible to make decisions for themselves. Thus the Capacity and Self-Determination Law enables a person to identify another person or persons who can make certain decisions for them if they lose capacity to do so. It 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. It also provides certainty for clinicians and professionals treating people who may not have capacity to consent to treatment. The 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 deprivation of liberty. Following the decisions of the European Court on Human Rights in Strasbourg and in the U.K. Supreme Court, this new 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 to ensure that 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 and their carers; also for the advocates and the courts to understand and apply in practice. The Council of Ministers again agreed in April 2004 with the then Minister for Health that this project should be commenced, not only to replace the Mental Health Law, which we started on that road yesterday, but to simultaneously develop this new piece of legislation to enable people to plan for a time when they lose capacity or may lose capacity and to make that decision for themselves to ensure that when a person does lose capacity to make a decision that they are supported and 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 this law, to draft them and implement them again by April 2018. To fulfil this objective, the project team, similar to the one that we had yesterday, was established. The project team conducted a consultation process about the development of the new Mental Health Law, the Capacity and Self-Determination Law in several phases. The consultation process culminated in a consultation on the new Mental Health Capacity and Self-Determination Law in the second half of last year. Again, the level of participation and commitment shown by the public and stakeholders was outstanding in the consultation exercises. The attendance was good and people made timely, considered and very helpful written submissions. The work that we had from Mind, in particular, was exceptional. The hard work and dedication of all those organisations and individuals who participated in the consultation process was essential, I think, to the progress and will be essential to the success of this project. So, again, I would like to thank all those people who gave of their time. That includes private individuals, carers, representatives from voluntary and community organisations, frontline staff in Health and Social Services, police, Her Majesty's Prison La Moye, the judiciary from the Criminal Courts, the Mental Health Review Tribunal and the Judicial Greffe, the Viscount's Department, the Law Society and the Safeguarding Partnership Board. As you can see, the people that we have been working with have been extensive to get the right law for Jersey. The consultation exercise received submissions from a range of professionals, including a number of legal professionals who provide curatorship services, and I would again like to particularly mention Mind for the work that they did. They provide essential independent advocacy services for people who experience mental health illness. We were able to draw on their experiences and their expertise, as well as further professional support to provide detailed and helpful feedback on the draft law, both ensuring that the clients' interests were represented in the consultation process. The purpose of this law is to provide a scheme of legal principles and safeguards for assessing whether a person has capacity to make a decision and if they are to be supported to do so. It is designed to

ensure that people are enabled as far and for as long as possible to determine their own care and treatment and is carried out with their own wishes. It safeguards their dignity and wellbeing, as I said at the beginning, and it must at all times be in their best interest. If a person does not have capacity to make a decision with support, then the law provides a number of processes to ensure that any decision made for that person is made by an appropriate person and is in the person's best interest. The capacity law will enable a person to identify a person or persons who can make those decisions should they lose capacity to do so. It provides a legal basis to make advance decisions. The capacity law applies to any decision affecting a person who may not have capacity, thus providing protection. It can be applied to day-to-day decisions about how people live their lives and manage their finances, as well as applied to decisions about how they might be cared for, what medical treatment they might get.

[9:45]

The capacity law is underpinned by a series of values and principles which are to be employed when adopting the law. These principles, above all things, are to empower the people to make decisions for themselves whenever possible. These are: that all adults 16 years and over are assumed to have capacity unless it is established that they lack capacity. A person is not to be treated as unable to make decisions unless all practical steps have been taken to help them make a decision. People are not to be treated as unable to make a decision merely because they want to make an unwise one. Anything that is done for or on the behalf of a person who lacks capacity must be done in their best interests. The purpose for which the Act is done or the decision is made on behalf of that person who lacks capacity should be achieved in ways that are least restrictive to the person concerned. For the purposes of this debate, I will outline some of the greater component parts of the Capacity and Self-Determination Law and then we will go on to talk about the Articles later. In many situations, individuals providing services, whether they be care professionals, financial advisers or others, may be involved with a person who they think may lack capacity to make a particular decision for themselves. As we have said before, these decisions may range from day-to-day actions or decisions about what to wear to life-and-death decisions about health care and important decisions about managing money and so on. The 2015 Safeguarding Partnership Board put in place a multi-agency mental capacity policy procedure which has been adopted by all member organisations. This policy set out a method of assessing a person's capacity to make a decision and the making of best interest decisions. It reflects the principles established in common law in England and Wales and codified in 2005. These principles have, in most respects, already been incorporated into customary Jersey Law. The draft law builds on this policy and the 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 that does not have capacity. Most of the provisions of Part 1 apply regardless of the nature of that decision and may need to be taken by or on behalf of a person. Part 1 therefore will 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 treatment and also, for example, by financial institutions in managing a person's assets. I propose this draft law to the Assembly and move on to the principles later.

The Greffier of the States (in the Chair):

Are the principles seconded? **[Seconded]** Does any Member wish to speak on the principles? Deputy Brée.

1.1.1 Deputy S.M. Brée of St. Clement:

With regard to the principles behind this, the question of determining whether someone has capacity does raise a slight concern in my mind and I was hoping that certainly the Minister could alleviate or settle my mind on this issue. The Safeguarding Partnership Board who apparently,

according to the principles, are the board that will determine whether or not somebody has capacity, would appear to totally lack any family member input. Now family members are those persons or person who has the most in-depth knowledge and closest understanding of an individual's behaviour or previous actions. I am slightly concerned that it would appear, certainly from the principles, that it is the State, and the State alone, that determines whether somebody lacks the capacity and there is no opportunity for a family or a family member to have any input whatsoever to that process, and that raises grave concerns in my mind. Thank you.

1.1.2 Senator S.C. Ferguson:

In reply to Deputy Brée, I would comment that certainly in dementia cases they creep up slowly and it is not until you review it afterwards that you realise you are in a position where you are caring for somebody with dementia. I have a very good G.P. (General Practitioner) who helped but it was just so gradual, you just did not notice. What does bother me about this law is there seems to be a significant lack of safeguards for the protection of the assets of the individual lacking capacity. Will the Minister confirm that such items as annual accounts will be specified in the Regulations? From my experience as a curator, there were 2 excellent controls: one was the requirement to ask the court's permission for significant expenditure and the other was the provision of annual accounts to the Judicial Greffe. It is absolutely essential that these provisions should be included in the Regulations because they do not appear to be in the law itself. There is also no indication of the protection of the individual if the carers or delegates are lacking. As a trustee of Age Concern, we have been made aware of cases where the curators are not ensuring that care is appropriate and the carers were perhaps not ideal and we have indicated to the Minister that we shall be descending on him. In conclusion, it is absolutely correct that this law is required because in my time as a States Member, I have known of individuals who have been treated as not having capacity, either to make decisions or to refuse treatment, and there has been virtually no means of protest, and the particular individuals have been completely coherent and capable of making decisions about their treatment and matters outside the particular peccadillo that they are suffering from. Such individuals must have protection, so I would recommend this law to the States because I thoroughly agree with it, with the proviso that the provisions I have mentioned are included either in the Regulations or somewhere. Unfortunately, I did not get back into the Assembly quickly enough to be able to bring an amendment to the law. Thank you.

1.1.3 Deputy J.A. Martin of St. Helier:

Just briefly, I would like to remind the Minister again on page 22, the financial manpower implications are exactly the same as the piece of legislation yesterday. I know they run in tandem, I still have concerns about the amount of money and the ongoing. As the Minister said in his summing-up, this is only to introduce, to get to the point of introduction. In the overall scheme, the Minister described certain Articles, and I know we are only at the principles, but part 3, the Advance Decisions to Refuse Treatment, if I am reading this correctly, and I may need guidance by the Attorney General, we have not had a debate in this House yet on whether we, as people, can refuse life-saving treatment but this gives a person with capacity the right. I may be wrong, I may be for that, I am just mentioning or asking the Minister when did we have this debate that people can decide that they do not want treatment? I just point that out. If this is how I am reading it, I think these Articles need to be taken separately. I know we are not on the Articles, we are on the principles, but this is a massive piece in there covered under 2 to 3 Articles that we are saying anyone who has capacity can refuse treatment to save their life. I do not think we do that now. No, I think we go as far as to say: "If I am not conscious, please do not resuscitate." This gives extra. I may be reading it wrong, I am asking the Minister for the interpretation. I have read it 3 times now and it is in writing. It is not in writing unless it needs to be for life-saving medication or something like that; I am not saying the words exactly. So, I am fully supportive of this. I am glad this has

come along with the other piece of legislation but I do have concerns about the implications this will cause without a proper debate on living wills even. I do not know where a living will stands in this. Mostly people who make living wills I know are overridden by the courts or the family. As Deputy Brée has said, where is the family involved? I flag these at the principles stage and then we will go further into them when we get to the Articles and maybe ask the Attorney General, so I give him warning - Solicitor General, sorry - to maybe allay my fears or to interpret what they exactly mean. Thank you.

1.1.4 Connétable C.H. Taylor of St. John:

Leading on from previous speakers, living wills are referred to on paragraph 64, page 13. My one concern is that once an L.P.A. (Lasting Power of Attorney) is appointed, they do not appear to be answerable to anyone and in particular the family. I understand there have been cases where a person responsible for an elderly patient has had little regard for wealth and this has severely affected the inheritance of the younger family members. There does not seem to be a check and balance in the appointment of L.P.A.s. I may be mistaken but that is just my reading and I raise it as a query. That was all, thank you. But otherwise I would like to congratulate the Minister. This is an excellent document and the principle of bringing it in, something new, and I think it brings Jersey up to date or puts us ahead of most countries and it really does set a very, very good standard for the Island. Thank you.

1.1.5 Deputy D. Johnson of St. Mary:

My point is a very simple one. It relates to the case where the person lacking capacity himself holds an office such as trustee, director or liquidator of a company. I have not easily found the provisions in the document which exempts any appointment as not affecting those officers. Could the Minister please point me in the right direction?

1.1.6 The Very Reverend R.F. Key, B.A., The Dean of Jersey:

I am delighted that we are bringing forward this legislation, not simply for the wellbeing of the people concerned, but also for the protection, guidance and, above all, clarity for the various agencies involved in looking after people whose health or mental capacity makes them in a position of vulnerability. I remember many years ago standing in a room with a vulnerable person whose mental capacity was decidedly questionable, with people from the English Social Services, with the G.P. and with a duty psychiatrist. It seemed to me that the professionals then were so unsure of what they could or could not do. Could not the church do more to support the person? Well, yes, we could and we did. Could the G.P. not do more? Well, he was already doing everything he could but supposing they did sign a section and then it was judged wrong? There was a great fear of doing the wrong thing by the professionals for which I just felt the most enormous sympathy. Therefore, the more clarity that legislators can give, then the more we are doing to make the jobs of those who work in these very difficult circumstances do their best for the people in their charge. Thank you.

1.1.7 Senator I.J. Gorst:

I do not want to add too much to what I said yesterday but I do just want to touch on the principles. I think most Members have this morning spoken about particular Articles and their concern there and I have no doubt that the Minister will address them during the course of that part of the reading of the law and Regulations which would come following.

[10:00]

I did just want to follow up on what the Dean said because I think what he said bears some contemplation. Because in my experience it is not just the professionals surrounding any given individual that do not want to do the wrong thing, it is everybody involved, and particularly the

connected families. Where there appears to be no answer, where there appears to be no solution, one of these things at the forefront of a family's mind is: "We do not want to do the wrong thing to make the illness or the situation worse. We just want to help make it better even when that is not possible." These decisions, it is my experience, are some of the most difficult decisions to make for those whom one might love. The time to say: "They cannot support themselves and they do need to be removed slightly from society for their own good" and then family and professionals having to visit and at the end of those visits the desire to go home with the family, so overwhelming and so painful. Yet, when there is an improvement and it may be decided with the appropriate professional advice and support that that individual should go back home, the individual themselves, having become reliant upon the institutional setting, wanting to remain there even though it is no longer in their best interests. These decisions are difficult, they are painful, and sometimes one never quite knows if one has got them right until many months or years down the line. It has got to be based on the best professional advice which I think has an overriding desire not to do the wrong thing perhaps, which is the negative, but the positive is to do the right thing. I thank again the Minister and all those involved who have brought forward this legislation to give a little bit more certainty, to give greater guidance to help in making the right decision at any given time during the care of the individuals that we are talking about who are, by very nature, at their most vulnerable. I just wanted to touch on something which is connected and it follows on from what Senator Ferguson said, which is perhaps not just a straightforward mental health issue but also an older issue and the dementia issue which, generally speaking, is an older person's issue. Members will be aware of a case which is being heard in the United Kingdom now about care for individuals with dementia and the workers were on call in the house of the person that needed the care for 24 hours a day, even though the company said they were only being employed to work for 10 hours a day. They were in these individuals' homes for 24 hours a day, sleeping in the same room of the person that needed the care, and that is the care that is needed. The question is being asked, this was in the United Kingdom, and I think it is a question we need to ask ourselves here as well: "Are we by default allowing a lesser standard of care for those older members of our community than we would expect for ourselves, particularly in a hospital setting?" Things that would be unacceptable and there would be public outcry about, rightly, we just need to ask ourselves and examine the service that we are providing. Is the one we are providing for some people to whom this law will affect, is it of an appropriate standard or do we need to consider whether it should be improved and increased? I know that the Minister will be following closely what is happening in that particular case. I know he and the previous Minister have fought hard for extra money into Health and Social Services to address some of these issues. It was the previous Minister who fought hard for the setting up of the Adult Safeguarding Board to make sure that we were thinking about these issues, considering them, and appropriately making policy decisions where necessary. So, I support the principles of this law. I accept that there will be some disagreement around the details but I hope that Members will recognise that sometimes it will be in the working out that refinements will be required. Thank you.

1.1.8 Deputy K.C. Lewis of St. Saviour:

I wonder if the Minister would clarify a minor point for me. On page 13 under 63: "Advance Decisions to Refuse Treatment (A.D.R.T.s). 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." But on page 45 under Interpretation: "a 'child' means a person under 18 years of age." I just wondered if the Minister would clarify that for me.

1.1.9 Deputy M. Tadier of St. Brelade:

As this is an in-principle law that we are passing today, I want to make some general comments. They do not necessarily talk to any particular Article but I think in the round they are generally

relevant. I think one comes to a point in one's life where one is no longer sheltered. One gets to an age where one has personal experience, not necessarily of oneself, but of family and friends who get into a position where they are no longer able to cope for themselves fully. It is difficult, I think, to see people who, in the past, have been the decision makers, the breadwinners and the homemakers get to a point where in fact they are in a position of themselves needing to be the ones to have decisions either made for them or assistance with some of those decisions and certainly basic everyday tasks undertaken for them, either fully or partially. Of course, to some that situation comes a lot earlier than to others and to some who are perhaps lucky, it never comes to them at all. I think what it brings to mind is perhaps the idea that I think we are all our brother's keeper, we are all our sister's keeper in society. I do not think anybody is an island. There is this idea when we are talking about very legalistically appointing somebody to be a curator, one point of legal representation, that we have an idea that that person is responsible and perhaps that is the only person. That is why I think the comments made by Senator Ferguson are quite right more generally, that the more checks and balances that there can be … and perhaps also when decision making can be shared, whether that be with the family informally or whether it be with more than one party legally, formally and officially, I think that has got to be better more generally. But I think there is an underlying issue which we all know with the ageing population is that people of course live longer. I was sitting at a table at dinner time with some residents of a care home and one lady who was quite clearly with her faculties said to me: "You know what, I think a lot of this dementia …" she said it in a good old Jersey accent which I will not try and replicate. She said: "You know, a lot of this dementia I think is because a lot of old people are just sitting around in homes, either in their own home, on their own or in care homes. They are sitting in their room a lot of the time and they have got nothing to do. They are not thinking and that is where a lot of the dementia comes from." That is quite true. Very good care is given across the Island in care homes, residential homes and within the family but could any of us really sit around many times not necessarily wanting to watch television? It seems we go from a state in life when we have got far too much to do with our lives, we do not have any free time and we are always running around, and then something can hit you, be it illness or a bereavement or a combination of those 2, and you go from a point from being far too active to being underactive and that has an impact. So this law of course is vital but I am much more interested in what we can do to prevent the need for curatorship, for people to be put in place of making decisions for us before we get to that stage. I think we need some creative thinking around this. Some of the people might have seen the videos that go around on social media. There is a home in the Netherlands called Humanitas where they have got some great thinking. It is a combination of an old people's home, if you like, with a young people's home. This idea that for some reason we need to segregate age groups in our society so that is for them, this is for them. Of course we keep prisoners in segregation but sometimes they seem to get more exposure to activities and provision, and absolutely that is quite right, but certainly the way we treat our elderly as a society I do not think it is through any active neglect but it is perhaps benign neglect. It seems to me very primitive that we, as a humanity and generally as a society, are still pursuing this way, so I would like to see much more action in what can be done with that. I would like to see much more action between primary schools and twinning with care homes in the community so that we can all be, if you like, taking responsibility for our elderly and people less able to make decisions. I know that may sound slightly woolly. I think it is important to make that point in this general debate, because of course we do need the legal provisions, but I would much like to see those legal provisions used in the minority of cases in the future rather than thinking that we have got these provisions in place and the social issues that underlie them do not necessarily get the recognition that they deserve.

1.1.10 Deputy A.E. Pryke of Trinity:

As you would expect, I very much support this piece of law - and it has been a long time coming here but we have arrived; well, the beginning of the journey - not only as the previous Minister for Health and Social Services but also I think as a professional who has been working with families, with patients for over 25 years in the case of making those difficult decisions when you are talking about the treatment, either stopping treatment or whether continuing with treatment or what type of treatment. This is important. This is important, as the Dean said, for professionals that they have the clarity but also for families too, that they know that when they make that difficult decision … and it is not just one person making that decision, it is multi-agency working with the families and also working with the person affected. The multi-agency working is so, so important because everyone is there for the best interests of the patients and of the family. So when it comes down to the Regulations and putting this piece of law in, training the frontline staff is going to be vital. I would just like to say, picking up a point Deputy Martin made, we have the right now to refuse treatments and all that is discussed obviously with the patient, with the G.P., with the doctor, with the consultants, et cetera, but at the end of the day it is your right whether you receive treatment or whether you do not have any treatment at all. The most important thing from that is it is all documented and the reasons behind it. I think as we go through the Regulations the importance of the living will makes it even more important that now, if we decide to do that, and that is something I think that I will be doing while I have still got my mental capacity and know what I want for my future, that is whether you put it with the family or with the G.P. so it is there and can be put into place when you have not got the mental capacity and which I hope I do not but, anyhow, who knows what the future holds. So I am very much supportive of this and also the importance of the Regulations that are going to come from it.

1.1.11 Connétable J.M. Refault of St. Peter:

I have been listening to some of the comments being made by Members this morning and reflect on my position as a Constable and one of the reasons I missed the first roll call this morning was I was dealing with an Adult Protection Unit issue where somebody needs to be looked after because my experience, unfortunately, as demonstrated in my role as Constable, is that not all families act in the best interests of the person that needs their care. They sometimes act in their best interests and ignore the interest of the person themselves. That is why I do not believe that families should be involved in the decision-making process on whether somebody has the capacity or not. That is a role for professionals.

[10:15]

The families need to be consulted on the outcome of that decision making process and must have an input to it but the decision must be made, in my view, by the professionals. I have dealt all too often, unfortunately, with these types of situations in the Parish and have again only this week advised Adult Protection Unit of another person who I believe is not being properly looked after by their family. This is one of the things that this law will help us to be able to do, to get professionals to come out and see these people and make sure they get the right protection and services that they so need. On the point of persons being able to make decisions on whether they wish to end their life or not is a matter which, in my own family, my own brother last year made the decision to stop all treatment for his cancer because he knew he was going to die anyway. A very good personal friend of mine earlier this year made the same decision. We can make those decisions for ourselves. We do not have to have medication forced on us and we should not and we should be allowed to say: "No, thank you. I have had enough. It is time for me to go."

1.1.12 Deputy R.J. Renouf of St. Ouen:

I do want to give support to the view put forward by the Constable of St. Peter. It is the case, sometimes, that families can have their decision-making powers, their ideas clouded by the history

of the family, by relationships and of course by financial considerations. So if a donor of a lasting power of attorney has appointed whoever their choice is it is that person's, it is that attorney, who is responsible and who has the position of trust to act in the best interests of the donor and to execute that trust without regard to ... well, yes, of course, to have regard to views of the family but not to be accountable to the family; that is most dangerous I would suggest. Ultimately that attorney should be accountable to the courts only as anybody exercising any function is accountable to the highest courts of the land but otherwise to be able to act independently and fearlessly without regard to any considerations or influences that a family might seek to apply.

1.1.13 Deputy P.D. McLinton of St. Saviour:

As curatorship seems to be coming up quite a lot in this Assembly I would like to maybe run some thoughts about the current curatorship law as it stands. A curator, under the current law, has no authority to make health or welfare decisions for a person. Once a person has a curator appointed they lose all control over the management of their finances and affairs even those aspects where they themselves had capacity to make decisions for themselves. The curator has no responsibility to support the person in question to live their life, only to conserve the person's assets. In other words, a person is really more than their money but this is about their money, their assets, as has been alluded to by the Constable of St. Peter. This has led in some cases to people with substantial assets being given only meagre amounts to live on. While many professional curators behave responsibly and with the very best of intentions the Mental Health Rules 1971 provide insufficient controls on the fees that they charge. In some cases this has led to a person's assets being entirely depleted by professional fees within a short space of time following which the person must fall back on the support of the State. So I just thought that I would mention those and there are many others that maybe the Minister will come to later with regard to curatorship and how, although it works well for some, it certainly is it not a fix across the board.

1.1.14 Connétable D.W. Mezbourian of St. Lawrence:

Obviously I welcome this draft law that is being brought forward today but my note of caution is just to be wary about when the State should intervene because we should all have freedom of choice and if we want to live in a certain way, if we want to live our lives in a way that is not perhaps acceptable to others, others disapprove of. It may be that we want to almost neglect ourselves; if we do not want to shower, wash, feed ourselves every day we should be able to do that. If our homes, for instance, are in a condition which others think are not an appropriate standard we should be able to make that decision for ourselves if we have the capacity. Looking at Article 6 "best interests", and obviously I know we are discussing the principles here, I do think that my concern is covered under that Article but I will raise it when the Minister addresses it because we should not be interfering and saying it is not good or healthy or right for someone to live in a particular way if they have made that as a conscious decision. Albeit we may think that we are acting in their best interests, this must not be allowed to remove freedom of choice because we do not like someone's life choice, the way they want to live their lives. It must be clear that we do not have the capacity to interfere if they have the capacity to have made that decision. As I say, I will ask the Minister to confirm that Article 6 headed "best interests" does cover that.

The Greffier of the States (in the Chair):

Does any other Member wish to speak on the principles? If not, Minister.

1.1.15 Senator A.K.F. Green:

I would like to thank all the Members that have spoken. I will attempt to answer all the questions. If I miss anything please come back but this is really important and I can see by the questions that I have been asked it is important. A lot of the points raised are covered when we go through the Articles but I would just like to make a couple of general comments and then answer the questions.

I thank the Chief Minister and the Dean for their contributions. As I say, I thank everybody for their contribution but I have a very simple philosophy in life and we will get talking about capacity law in detail in a minute. We do not need a lot of rules and legislation and everything else about standards of care. It is very simple in my view. If it is not good enough for my mother then it is not good enough for anybody else's and that is the principle that I think we should start from in looking at what care will be provided. Capacity though is complex and yet it is simple. It is complex because the fact that somebody lacks capacity in one area does not, as others have inferred, imply that they lack capacity in another area. They may well have capacity to decide what entertainment they wish to enjoy, whether that is going to the pictures or whatever, what food they enjoy, what clothes they wear but they may not have the capacity to make bigger decisions for themselves. The Constable of St. Lawrence, and I know that we will do it when we look at the Articles, made, I think, a very important point that the point of a capacity law is to support people when they lose capacity. It is not to run their lives for them and that the people must have the right to make what would appear to be unwise decisions so long as they have the capacity to make that decision and that is really important. I would like to talk about some of the questions now. Deputy Brée was concerned about family input and the Chief Minister spoke about family input. When it comes to assessing capacity that must be assessed by a competent person. It does not have to be somebody from Health and Social Services but only a competent person can assess capacity and that is covered later on. But family is important, very important, and one of the talks I regularly give with my Headway hat on when I go to the U.K. circuit of Headway branches is I pose the question and then talk about it is: are families part of the solution or part of the problem? I would suggest at different times they are both. Senator Ferguson asked about safeguards. I know that the Senator made it quite clear yesterday that she would prefer to have seen the curatorship system left in place. That has many disadvantages as well as being costly to administer and my Assistant Minister, Deputy McLinton, did cover some of the areas where curatorships have been a problem in preserving wealth to the detriment of the enjoyment of the life of the person that they were looking after. Of course it is a balance. You have to have that balance. We have got the regulations to do it and I did listen to the Senator when she made comment at one of our consultations at the Town Hall. It does seem to me we want to keep the system simple in terms of how people manage and safeguard wealth but it does seem to me that we should have accounts but they should be available for inspection. They should not have to be filed every year and there is a very sound reason for that. If a husband has lost capacity and the wife is running the household they find it very infuriating at the moment, they have to go to the curator to purchase something. The wife should be allowed to if she has been granted that right to do it, to do it properly but also keep records. So Deputy Martin, I think some of the points that she raised were covered by the Deputy of Trinity but we have the right now to refuse treatment and I certainly have a view myself as to which treatment I would accept and which treatment I would not but the problem comes if I do not have either the capacity or I am unconscious so therefore do not have the capacity for my wishes to be carried out. The Constable of St. Peter mentioned one case where his brother chose not to take treatment. I had 2 friends who were diagnosed on the same day with the same cancer; one chose to take all the treatment going, the other one declined the treatment. They died on the same day but I do know which one had the best end of life but that is a matter of choice and people should have the right to make that choice and they have the right now. This law helps people in the event that they lose capacity, they would continue to be respected in the way that they would want to have been had they had that capacity. So the advanced decision is about a living will if you like. Sorry, the Constable of St. John asked a question about curatorship and wealth but if I have not answered it I will come back to that. Deputy Lewis asked a question about age. It is the same question as yesterday really that came from the Deputy of St. John. We spent a long time looking at this. Something I challenged on. I challenged on whether in certain circumstances it should have been lower than 16 and as we know Gillick law in the U.K. has approved that it should be lower in

certain circumstances. We spent a long time talking about this and challenging whether 16 or 18, or whatever age it should be, but it does seem right that a 16 year-old who after all, as I said yesterday, has the right to consent to sexual intercourse, has the right to vote, should have the right to determine what treatment they will have or will not have providing they have capacity, 18 for all other things. I listened with interest to Deputy Tadier and I agree with him that more creative thinking is required in some areas. There is no doubt that routine and having a purpose in life does keep us bright but of course the lack of that is not what causes dementia. The lack of that is what gives us the lack of focus in the day. Dementia is an entirely medical condition. I think I have covered most of the points. The point is that this is not about the State intervening. The point is this is about people being supported when they do not have capacity but as time goes forward that people would have made it quite clear in advance what they wished to happen in certain circumstances so the State input will be less and less if we get this right. I think I have covered all the questions but if I have not I am happy to pick them up now.

The Greffier of the States (in the Chair):

Those Members in favour of the **[Interruption]** ... the appel has been called for. I ask Members to resume their seats and I ask the Greffier to open the voting.

POUR: 37		**CONTRE: 0**		**ABSTAIN: 0**
Senator P.F. Routier				
Senator A.J.H. Maclean				
Senator I.J. Gorst				
Senator L.J. Farnham				
Senator P.M. Bailhache				
Senator A.K.F. Green				
Senator S.C. Ferguson				
Connétable of St. Helier				
Connétable of St. Clement				
Connétable of St. Peter				
Connétable of St. Lawrence				
Connétable of St. Martin				
Connétable of St. Saviour				
Connétable of St. John				
Connétable of Trinity				
Deputy J.A. Martin (H)				
Deputy of Grouville				
Deputy J.A. Hilton (H)				
Deputy of Trinity				
Deputy K.C. Lewis (S)				
Deputy M. Tadier (B)				
Deputy E.J. Noel (L)				
Deputy of St. John				
Deputy S.J. Pinel (C)				
Deputy of St. Martin				
Deputy R.G. Bryans (H)				
Deputy of St. Peter				
Deputy R.J. Rondel (H)				
Deputy of St. Ouen				
Deputy R. Labey (H)				
Deputy S.M. Wickenden (H)				
Deputy S.M. Bree (C)				
Deputy M.J. Norton (B)				

Deputy T.A. McDonald (S)				
Deputy of St. Mary				
Deputy G.J. Truscott (B)				
Deputy P.D. McLinton (S)				

[10:30]

The Greffier of the States (in the Chair):

Deputy of St. Ouen, does your panel wish to scrutinise this?

The Deputy of St. Ouen (Chairman, Health and Social Security Scrutiny Panel):

No, we do not. We give it our full support and we are likely to scrutinise the Regulations that will follow but at this stage, no.

The Greffier of the States (in the Chair):

Very well, Minister, how do you wish to proceed with the Articles?

1.2 Senator A.K.F. Green:

I am going to apologise to Members but I think this is too important just to say: "Well, *en bloc*. We will do the whole lot", because I know that there are some Articles that Members would like specifically to take a look at but this is new law, this is not just adapting something so I hope people will bear with me and I will work my way through. So starting with Part 1 and I did spend some time this morning seeing if I could reduce this and still maintain the integrity of what we are doing today but I am afraid I could not so I hope Members will bear with me. Part 1, the Capacity and Self-Determination Law makes provisions for individuals who lack capacity and in particular to provide for circumstances in which the procedures by which certain decisions may be taken in relation to or on behalf of such individuals. It will establish a new regime of assessments and authorisations for the proper care and management of people. Article 1 gives general definitions. Article 2 deals with the 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 that it should not be exercisable in respect of a child under 16. Article 3 states that the overarching principles to which regard must be had by anyone applying the provision of the law. Articles 4 and 5 of the law set out a simple test to be applied when assessing a person's capacity to make a decision. The test is decision specific and time specific. So what we mean by that; in some cases people lose capacity for the rest of their life but in some cases people lose capacity for a period of time so that the person must have the capacity to make a particular decision on a particular day about aspects of their care, but if they do not then we may make that decision for them. Under this test no one should be labelled as incapable or incapacitated as a result of the 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, to their appearance or any condition or any aspect of the person's behaviour which may lead others to make assumptions about capacity. Moreover the foundation for the law is that it should be assumed that a person aged 16 or over will have the capacity to make decisions for themselves. Article 4(1) provides for the purposes of the law where a person lacks capacity in relation to a matter if there is evidence that the person is unable to make a particular decision at the time the decision needs to be made because he or she has an impairment or a disturbance in the functioning of the mind or brain whether permanent or temporary. Article 5(1) provides under the law that a person is unable to make a decision for themselves if they are unable to understand the information relevant to the decision, to retain that information, to use or weigh that information as part of the process of decision making or to communicate the decision whether by talking, using sign language or by other means. A person should not be regarded as unable to do any of the things mentioned in Article 5(1) unless all practical steps have been taken to ensure that the person can make the decision for themselves or cannot make the decision for themselves. For example, before

deciding that a person is unable to understand the information relevant to the decision the person should be given the relevant information in a way that is appropriate to his or her circumstances using simple language, using visual aids or using any other means. Also evidence that a person may make an unwise decision, which I think comes into the Constable of St. Lawrence, an unwise decision will not in itself be evidence that a person lacks capacity to make a particular decision. If a person does not have the capacity to make a particular decision then before the act is done or a decision made on their behalf the person who proposes to make the decision it should be established what is in the person's best interest and act accordingly. Article 6 of the 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 a person's age or appearance or condition or behaviour but should consider all the relevant circumstances and where it is reasonable and practical to do so encourage the person to participate as fully as possible in the decision-making process. The best interests of the person should be determined with consideration and in particular to 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 or she will, when that is likely to be. It will also consider the person's past and present wishes and feelings which may include any relevant written statements made before he or she lost capacity. It should consider their beliefs and their values that would be likely to influence his or her decision and any other factor that he or she would be likely to consider were they able to do so. The law also states that a person proposing to make a decision on behalf of someone else must, if it is practical and appropriate, consult them to take into account the views of the following persons as to what would be in the person's best interest. That would be anyone named by the person as someone to be consulted on the matter in question or on matters of that kind, anyone engaged in caring for the person or interested in his or her welfare, anyone who has a lasting power of attorney granted to them which applies to the decision in question or any delegate or any other person appointed by the Royal Court to handle their affairs. Excluded decisions, 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 law specifies the nature of such matters which would include decisions relating to marriage, to civil partnerships, to divorce, sexual relationships and voting. In addition they will include decisions that may be made about treatment for mental health disorders where someone is being detained and treated under yesterday's debated Mental Health Law. Acts in connection with care and treatment as well as protecting the rights of people who may lack capacity Article 8 of the law provides for people making decisions about a person's care or treatment with greater legal protection provided that they have taken reasonable steps to establish whether a person has capacity and reasonably believes that they do not. Also that they reasonably believe that a particular course of action is in the person's best interest. When the person making the decision on the person's behalf has complied with the law with respect to assessing capacity and best interest 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 any loss, damage or negligence in the way that they do not 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 making proper care to a person lacking capacity. Article 9 deals with the potential liability of a person for acts done in connection with care or treatment of the person lacking capacity and Article 10 describes the circumstances by which payments may legally be made on or on behalf of the person lacking capacity. I ask the Assembly if they will approve Articles 1 to 10 which is part 1 of the law.

The Greffier of the States (in the Chair):

Are the Articles seconded? **[Seconded]** Does any Member wish to speak on Articles 1 to 10?

1.2.1 Deputy S.M. Brée:

Perhaps I am not reading this correctly but I would hope the Minister would be able to clarify something. Once a decision has been made by the appropriate body that somebody is lacking capacity and therefore requires State intervention, is there any appeal process against that decision by either the individual who has been classified as lacking capacity or the family of that individual?

1.2.2 The Connétable of St. Lawrence:

I have heard what the Minister said. I just want him to confirm, looking at Article 6, that this cannot be used by agencies who do not like someone's lifestyle choice to try and prove that capacity is lacking in the individual who makes that lifestyle choice. It cannot be used to interfere if there is no indication that capacity is lacking. Does the Minister understand what I am trying to say because maybe that is more than I do? But I am sure he will be able to give me a clear and concise answer to my unconcise question.

1.2.3 Deputy C.F. Labey of Grouville:

I would just like to explore the idea of the living will if, for example, there has been dementia in a family and, as some of us know, that can take many years before that person meets their maker. If, while they had the capacity, they were to leave a living will and they would not want to remain in a state where they were incapable of looking after themselves, they had no quality of life whatsoever and it was just a case of waiting, if they had given a will to say ... and I think one of the only places that they can go to is Switzerland where euthanasia is legal, I just do not understand how and if they would be supported in that. Obviously not here but ... a bit like the Constable of St. Lawrence, it is quite a hard thing to explain but they had left a living will when they did have the capacity, they could sort of see the signs of what was happening to them and they would want to bring about a timely peaceful end to their own lives. How is that supported?

The Greffier of the States (in the Chair):

Does any other Member wish to speak on these Articles? If not, Minister ...

1.2.4 Senator A.K.F. Green:

I will deal with the Deputy of Grouville's question first. Fundamental to this law is that the person acting on behalf of another person cannot carry out an illegal act on their behalf, even if the person with capacity had asked to do something illegal, that is, it is illegal to end somebody's life, so that cannot be done, even if the person expresses that wish. It may not be the answer the Deputy wants to hear, I do not know, but the person who acts on behalf of another person does so in their best interests, but also within the law of the land. I had hoped that I had satisfied the Constable of St. Lawrence, and it is a difficult one to get one's head around, because the fact that somebody chooses not to wash or chooses to stay up all night and sleep all day, may be alien to some of us but a person who has capacity has that right to make that decision. It is only really if it has a detrimental effect on them and, even then, they have the right to make that decision if they have got capacity, if that makes sense. I would suggest that it would be looked at if it was having a harmful effect on somebody else, so a neighbour or whatever.

[10:45]

Deputy Brée, there is an appeal system, but we will get to that later. I ask Members for the appel on those Articles 1 to 10.

The Greffier of the States (in the Chair):

The appel has been called for on Articles 1 to 10. I ask Members to resume their seats and I ask the Greffier to open the voting.

POUR: 36		CONTRE: 0		ABSTAIN: 0
Senator I.J. Gorst				
Senator L.J. Farnham				
Senator P.M. Bailhache				
Senator A.K.F. Green				
Connétable of St. Peter				
Connétable of St. Lawrence				
Connétable of St. Mary				
Connétable of St. Brelade				
Connétable of St. Martin				
Connétable of St. Saviour				
Connétable of Grouville				
Connétable of St. John				
Connétable of Trinity				
Deputy J.A. Martin (H)				
Deputy of Grouville				
Deputy J.A. Hilton (H)				
Deputy J.A.N. Le Fondré (L)				
Deputy of Trinity				
Deputy K.C. Lewis (S)				
Deputy M. Tadier (B)				
Deputy E.J. Noel (L)				
Deputy of St. John				
Deputy S.J. Pinel (C)				
Deputy of St. Martin				
Deputy R.G. Bryans (H)				
Deputy R.J. Rondel (H)				
Deputy S.Y. Mézec (H)				
Deputy of St. Ouen				
Deputy L.M.C. Doublet (S)				
Deputy R. Labey (H)				
Deputy S.M. Bree (C)				
Deputy M.J. Norton (B)				
Deputy T.A. McDonald (S)				
Deputy of St. Mary				
Deputy G.J. Truscott (B)				
Deputy P.D. McLinton (S)				

1.3 Senator A.K.F. Green:

We will do parts 2 and 3 next, Sir. These are part of the law that pertain to future planning: the importance of self-determination under the 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. This planning takes 2 forms: a lasting power of attorney, to be referred to within the law as the L.P.A.. This can be made under part 2 of the law to determine who is entitled to make the types of decision for a person, including in the event that he or she loses capacity. The other part, an advance decision to refuse treatment, 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 should lose capacity. The lasting power of attorney which, as I say, is referred to as the L.P.A., is Article 11, part 2 of the law. The nature and definition of the lasting power of attorney will allow a person who is 18 years of age or over ... that is where I think some of the confusion comes with what Deputy Lewis is asking: for a lasting power of attorney you have to be over 18. As long as you have capacity to determine what

treatment you want, you can do that at 16. I hope that is clear to the Deputy. Article 11, the nature and definition of the lasting power of attorney, will allow a person who is 18 years of age or older to appoint another person to make decisions on their behalf. Article 12 defines how people are appointed to the role of lasting power of attorney and, in order to make a valid L.P.A., the donor would need to have the capacity to make that decision to appoint an attorney when they complete the form to appoint the attorney. Article 13 is made in accordance with part 1 of the schedule, the execution of the lasting power of attorney, and it is to be registered in accordance with part 2 of the schedule, Registration of Lasting Power of Attorney. An attorney will have the power to make decisions on behalf of the individual in their best interests. The law outlines types of L.P.A.; Articles 14, 15 and 16 are the types of L.P.A that they may choose to make. The types of L.P.A, so that is the lasting power of attorney, under Article 14 are health and welfare, under Article 15 are property and affairs, and under Article 16, general matters. I think this is one of the benefits of moving away from the curatorship where the whole lot was done by one person. So very often it was about preserving the asset rather than the health and welfare of the patient. The health and welfare of an L.P.A. will allow the attorney to make decisions about things like the daily routine: eating drinking, what to wear, medical care, moving into a care home and life-sustaining equipment. This would not have any practical effect until the donor loses capacity to make their own decision. A property and affairs L.P.A. would allow the attorney to make decisions about the donor's property and financial affairs, such as paying bills, applying for and collecting benefits, disposing of assets. This L.P.A. could potentially be used while a donor still has some capacity, if permission is given in the L.P.A. for that to happen. The attorney may be appointed to act alone or may be appointed so they must act jointly with other attorneys, such as son and daughter could be working jointly, or it can add more than one attorney and they can act individually. A person may, as I say, appoint more than one person as an attorney and sometimes allow them to act separately. The donor can also stipulate that there are other matters in respect of which an attorney must act jointly. So you could have a combination where they can act individually on some things and must act jointly on others. The 2005 Act contains provisions relating to lasting power of attorney in sections 9 and 14. In practice, an application in the U.K. for an L.P.A. needs to be witnessed and, once the L.P.A. has been completed, an application needs to be made to the Office of the Public Guardian, a statutory body in the U.K., to register L.P.A.s. In the U.K., it costs £110 to register an L.P.A. and £220 if a person was to register both health and welfare and property. Further, as the forms used to appoint attorney and register L.P.A.s are complex in the U.K., it is often the case that the person in the U.K. will need legal assistance in order to complete the process. There is evidence that in the U.K. the complexity and the expense of registering an L.P.A. has had a negative effect on the number of people using them. As far as it has been possible to do so, with the law and subsequent subordinate legislation that might be made under it, we have sought to streamline the process for making L.P.A.s and will make it sufficiently simple so 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 in place. The law requires that any L.P.A. must be set out in the form prescribed by the Minister, by order, and registered with the Judicial Greffe. In accordance with the requirements set out in the schedule to the law, before it can come into effect, the L.P.A. must be registered by the donor or the attorney, but the requirement to register an L.P.A. affords an important opportunity to challenge or resolve disputes about an L.P.A. and may save time and expense in the long term. Proof of a registration of L.P.A. could also provide certainty to those who transact with an attorney on the donor's behalf. The administration costs of the Judicial Greffe may be passed on to those making L.P.A.s by making it a requirement that an application be accompanied by a fee. The level of that fee will be prescribed by the Minister by order. It is intended that the form for appointing an L.P.A. will be simplified in comparison with the one in the U.K. It is proposed that a short form, possibly no longer than 2 A4 sides of paper, will be required to make the appointment of an L.P.A., 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 signature of the donor, of the potential attorneys, and the signatures need to be witnessed. The persons who witness the donor signature must confirm that, in the witness's opinion, the donor understands the purpose of the L.P.A. and the authority that they are conferring, and has not been subject to undue pressure. At the moment, it is not possible to make an L.P.A. if you are a Jersey resident, however, an enduring power of attorney, the precursor to the L.P.A., or the L.P.A. made in the U.K. by a U.K. resident, can be exercised in relation to assets in Jersey provided it has been registered by the Judicial Greffe. The regulations made under the law may make further provision for the purpose of recognising U.K. L.P.A.s, and further work will be undertaken to ensure that the validity of L.P.A.s made in Jersey is fully recognised in respect of the assets in the U.K. It is important to note that a health and welfare L.P.A. will not authorise the giving or refusing of consent to life-saving treatment unless the instrument contains express provision to that effect. What we are talking about there is life-saving treatment, not ending somebody's life. Further, the donor may place conditions or restrictions to the exercise of the authority by an attorney and make at any time, while they still have capacity to do so, revoke the power. L.P.A.s may be revoked as described in Article 17, which includes the situation where a person appointed by the L.P.A. dies or loses capacity to act themselves. Article 18 preserves the validity of transactions already undertaken where an L.P.A. is revoked and the acts done in the belief that the authority had genuinely been conferred. Articles 19 and 20 of the law give the Royal Court jurisdiction to determine the validity of lasting powers of attorney, including any questions relating to whether the requirements for the creation of the L.P.A. have been met and whether the power has, or not, been revoked, or has otherwise come to an end. The Royal Court may direct that an L.P.A. 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 a person to make the L.P.A., or if the attorney has behaved, or is proposing to behave, in a way that contravenes his authority or is not, or would not be, in the donor's best interests. The Royal Court also has the power to determine any questions as to the meaning or effect of an L.P.A. and to give direction with respect to decisions which the attorneys, or attorney if there is only one, have authority to make which a donor lacks capacity to make. Part 3 of the law provides that a person who is 16 years of age may make a decision in advance to refuse treatment if they lose capacity. What they cannot do, though, is appoint somebody until they are 18 to make decisions on their behalf. That is what I am trying to get across. I am looking at Deputy Lewis, because I know he asked the question. So at 16 they can make decisions about their care; what they cannot do until they are 18 is appoint someone else to make decisions for them. This is known as an advance decision to refuse treatment, an A.D.R.T., and the effect should be the same as a decision made with a person to refuse capacity. Article 21 provides that such decisions do not need to be expressed in medical terms, so long as they are clear. Article 22 provides that, where an A.D.R.T. concerns a 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, for example, even if a person ... and we will call this person "P" because I have used "P" a couple of times to demonstrate things as we work our way through the latter part of the law. So, in addition, there must be an express statement that the decision stands, for example, even if P's life is at risk. "Life sustaining treatment" means treatment which, in the view of the person providing health care, is necessary to sustain life. Article 23 of the law describes the effect of an advance decision, and Article 23(3) provides that medical professionals are not liable for the consequences of withholding or withdrawing treatment from P. if they reasonably believe that the advance decision has been made, and it is valid and acceptable to that treatment. Can I ask the Assembly to approve Articles 11 to 23? That is parts 2 and 3 of the law.

The Greffier of the States (in the Chair):

Are the Articles and the schedule seconded? **[Seconded]** Does any Member wish to speak on Articles 11 to 23 and the schedule? Deputy Kevin Lewis.

1.3.1 Deputy K.C. Lewis:

Apologies for labouring the point, but it was not so much power of attorney I was enquiring about, it was something that the Deputy of St. John highlighted yesterday as to whether somebody under 18, according to the schedule here, is interpreted as a child. I know 16 year-olds have the age of consent and they can vote, but they cannot go into pubs to buy beers and go off to war. It is this definition of what is and what is not a child. On the bottom of the schedule on page 13: "Matter of an Infant (1995)."

[11:00]

It says: "We are in no doubt we should adopt the principles described in English law" blah blah blah: "reflecting the laws of Jersey that a competent adult with full capacity has an absolute right to refuse consent to medical treatment or to take food and drink for any reason at all, even when the decision may lead to his or her death." Is a 16 year-old competent to make that kind of decision? I know the Minister said they should be, but I wonder if we can have a definition in law, possibly from the Solicitor General, if that is the case?

1.3.2 Deputy T.A. Vallois of St. John:

I would just like to understand, in practice, how the advance decisions would work, and particularly whether it was in a medical setting, or how those people would know. It is just the practical elements of that particular advance decision. In Article 22, it specifically says in paragraph 4: "An advance decision is not applicable to the treatment in question if (a) the treatment is not treatment specified in the advance decision." How does somebody know that at that point in time and how is that considered, going forward?

The Greffier of the States (in the Chair):

Does any Member wish to speak on this part of the law? If not, Minister?

1.3.3 Senator A.K.F. Green:

I do not know if the Solicitor General can help me with the 16 versus 18. We did have very, very long discussions about this and settled for 16 year-olds being able to determine what treatment they wish to have, but not being able to appoint someone until they are 18 to make decisions on their behalf, but I do not know if the Solicitor General can explain it better than I can.

The Greffier of the States (in the Chair):

Thank you. Can you advise us?

Mr. M.H. Temple Q.C., H.M. Solicitor General:

I will attempt to do so, Sir. The general age of majority is 18 in Jersey but it is open to specific legislation, such as this, to vary that position if this Assembly decides that is appropriate. In this case, we are dealing with part 3, and it is Article 21(1), and it specifically states that: "An advanced decision means a decision made by a person aged 16 years or over." So this law is giving specific jurisdiction, or ability, for a 16 year-old to make a decision about their treatment in advance. So, yes, I confirm the Minister's previous answer. Just while I am on my feet, going back to a question that was raised by Deputy Martin about decisions to refuse treatment in advance, this would be the first legislation, that I am aware of, in this jurisdiction that confirms that ability, but it is confirming something that already exists and has been recognised by courts here, by the Royal Court. So the Royal Court in the case of *Attorney General* v *X*, which concerned a situation where a prisoner in La Moye was on hunger strike and the court specifically confirmed in that case that the prison

authorities and the medical authorities were not obliged to administer treatment to that prisoner where he had become incapacitated through hunger strike. So the court already has, at least once, recognised an advance decision to refuse treatment in this jurisdiction.

The Greffier of the States (in the Chair):

Thank you very much. Minister.

Senator A.K.F. Green:

I am picking up on the Deputy of St. John. Again, we had discussions as to how would somebody know that someone had expressed a wish not to be treated or to be treated in advance. While that is not set out in the law, the intention is that G.P.s and the hospital will have that on record; we have yet to bring in a system to do that, and that will be worked up with the regulations. The Deputy of St. John asked what happens if a situation in the advance decision for treatment is not covered in the person's advance decision ... is that right?

The Deputy of St. John:

Sorry. Particularly in Article 22 paragraph 4 where it states: "An advance decision is not applicable to the treatment in question if (a) the treatment is not treatment specified in the advance decision." I am just questioning in terms of there may not be those particular treatments around at the time you make that advance decision in future. What is the situation with regards to that?

Senator A.K.F. Green:

I would have to be guided by the Solicitor General, but I think it is quite specific, and the Solicitor General will correct me if I am wrong, that if the person has not covered that in their advance decision then there is no advance decision for that particular aspect of treatment. Of course, the person has the right to change their advance decision at any time that they have capacity.

The Solicitor General:

That is correct: if it is not clearly specified in the advance decision notice, then it would not be covered. If there is an element of ambiguity around the language used, then there is a jurisdiction for the court to consider the language used and rule upon it, and that is in Article 23(4) and (5). So it has got the ability to make declarations about the validity and the treatment that it encompasses.

Senator A.K.F. Green:

I think that covers the questions that were asked, so I ask the Assembly if they would vote on Articles 11 to 23; that is parts 2 and 3 of the law.

The Greffier of the States (in the Chair):

All those in favour of Articles 11 to 23 and the schedule, kindly show. Those against? The Articles are adopted. Minister.

1.4 Senator A.K.F. Green:

Part 4 now. It is the intention with this new law to encourage as many people as possible to make L.P.A.s, lasting powers of attorney, however, there may be situations in which a person loses the capacity to make a decision for themselves and has not appointed an attorney to make a decision for them, whether that be about their care, whether that be about treatment, or property and other affairs. The present Mental Health (Jersey) Law 1969 makes provision as to how the affairs of such a person may be handled. It provides for a person, subject to meeting certain tests, to be received into guardianship for the purposes of making some decisions about welfare matters or, under the current law, to have a curator appointed to manage the person's financial affairs. As I have said before, there are limitations in respect of the curatorship and the guardianship, which

cause difficulties in practice. In the new Mental Health Law, which we debated yesterday, it was 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. The current curatorship provisions in the Mental Health (Jersey) Law 1969 allows for a person to be appointed by the Royal Court, known at the curator, to manage the affairs of a person. However, these provisions have a number of limitations, as we have talked about over the last 2 days. In some respects, as I have indicated, they are too restrictive, they are inflexible and they do not allow curators to deal properly with a person's assets. For example, Article 43(17)(a) of the Mental Health (Jersey) Law 1969 requires a curator to apply to the court whenever it appears necessary or expedient to arrange for, or to authorise sale or exchange or charging of any other disposition or dealing with the property of the person. Such an application is then examined by 2 Jurats who decide whether the action is necessary or expedient. I would argue that this regime has been too cumbersome; that is the feedback that we got back from very many of the people who came to our consultations. They say it has been too restrictive, particularly when the curator, as I indicated earlier today, was the person's spouse or civil partner. Further, the provisions at present require the Attorney General to make application to the court for the appointment of a curator, even when there are few, or no, substantial assets to manage. Also, there is currently insufficient control on fees, which my Assistant Minister was talking about before, that may be charged by curators, nor are there sufficient powers or resources devoted to the examination of accounts filed by curators. There have also been difficulties in persuading some lawyers to undertake curatorship, especially when the person has little in the way of assets, and it is unlikely that the curator will be able to recover fees for the work done as legal aid. The Viscount's Department currently provides a service as curator of last resort, but the resources for this work are very limited and, aside from the powers in the Mental Health (Jersey) Law 1969, it is important to recognise that the court also has non-statutory powers to make decisions on behalf of a person who lacks capacity. So it is support at the moment, making decisions on behalf of a person who lacks capacity to make a decision for him or herself. These powers form part of an inherent jurisdiction of the Royal Court and, while best-interest decision-making should really, in general, be 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 the person's capacity or best interest. The new Mental Health Law has sought to repeal - and that is important; repeal, not replace - the law with respect to curatorship. In place of the system, the new law will codify and supplement the inherent jurisdiction of the Royal Court, giving it express powers to make decisions on behalf of a person who lacks capacity to make decisions for themselves, but the Royal Court is also given the power to appoint a person, referred to as a "delegate", to make certain decisions where the Royal Court cannot make a one-off decision to resolve issues. The provision for the Royal Court, or delegate, to make decisions on a person's behalf would replace the provisions for curatorship and would provide an alternative to the receipt of a person into guardianship, particularly when the person does not have capacity to make decisions about welfare matters for him or herself. Similar to the L.P.A.s, the new law provides that delegates may be appointed to make decisions on either health, welfare or the property affairs of a person, or both. The extent of the delegate's authority would be determined by the Royal Court, Article 24, and could be limited to particular decisions by reference to a particular period of time. Article 25 lists the persons who may apply to the court to exercise its powers. Article 26 sets out the procedures to be followed for application to the court in respect of a person who is undergoing treatment in an approved establishment, or who is received into guardianship under that law. In such cases, applications may be made by the Attorney General. Article 27 makes specific provision for the kinds of decisions which may or not be made by the court. Article 28 makes similar provision as to the powers which may or may not be exercised by the court or delegate

appointed to deal with the person's property or affairs. Article 29 enables the court to order reports as to a person's condition or circumstances for the purposes 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 authorising persons, whether appointed as delegates or not, to do so on behalf of the 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 powers 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. The appointment of a delegate by the Royal Court should not limit the jurisdiction of the Royal Court to consider any matter relating to the person who lacks capacity.

[11:15]

The Royal Court will still be able to make declarations, decisions and orders affecting people who lack capacity. The Royal Court will need to be involved in complex or disputed cases, for example, when it is unclear whether someone lacks capacity or what is in their best interests and the decision is significant. The new law provides the Royal Court with the power to make a declaration or order, to give direction to make an appointment on such terms that is clearly in that person's best interests even though there is no application before the court for an order, direction or appointment of those terms. Article 34 deals with qualifications such as the requirement that an individual must be aged over 18 to be appointed as a delegate. Article 35 sets out general powers of delegates to do everything which appears necessary or expedient to be done in the interests of the person. Article 36 of the law further provides that delegates may do such things that are necessary or expedient to be done in P's interests, subject to conditions and restrictions placed by the authority of the delegate by the court. Article 24(3) of the law requires the Royal Court to consider what powers it is appropriate for the delegate to have. Article 36 contains the powers for the States by regulations to make provision to confer appropriate regulatory powers on the public authority for the purpose of supervising and regulating attorneys and delegates. Can I ask the Assembly if they would vote on Articles 24 to 36, Part 4 of the law?

The Greffier of the States (in the Chair):

Are the Articles seconded? **[Seconded]** Does any Member wish to speak on Articles 24 to 36?

1.4.1 Senator S.C. Ferguson:

It is not altogether clear how the court is going to hold the delegate to account. If there are any assets, particularly with a dementia case, which is something I know something about, the individual for whom you are a delegate is particularly vulnerable. I am sorry to keep harping on about it but will the Minister confirm that the discipline of submitting accounts annually will be included in the regulations since I cannot find anything here in the primary law. Submitting a set of accounts is a discipline that if the accounts do not appear then it is obvious that there is something going on that might not be right and you can take action. If you just leave it and you do not have accounts submitted then there will possibly come a time, and all the people who are permitted to be delegates might be incompetent or might just be fraudulent and by the time you find out that there is anything wrong any assets have gone walkabout. I really think we need to have controls somewhere in the setup. As I say, I apologise for going on about this but I have been there and I have done all this and I appreciated the rigour with which the Judicial Greffe said: "Accounts every year, please" because it helped preserve the controls.

1.4.2 Senator P.F.C. Ozouf:

Senator Ferguson makes some important points and I just make the observation *en passant* that the debate we are having on this and the points that are being made and the Minister's need to go

through this is perhaps reflective of the fact that this is the kind of legislation that ought to have been at a committee stage and these questions resolved before it comes to this Assembly as a whole. I just make that as an observation because the Minister is right, and the Senator is right to ask questions, but these are the issues of detail that scrutiny of legislation would have dealt with before rather than now. But it is important that it is got right. I would say, and the Minister will respond, in response to the points that Senator Ferguson makes, firstly I think we should take this opportunity of thanking all of those, because we are moving on from a court system of curatorship, which I have also personal experience of; not myself but somebody very close to me. The court has been extremely flexible and pragmatic in the way they have handled what are effectively administrative matters which should not really happen in that way. But also the changes that are being made have to be correct because accounts may be needed to be included in regulations and that is fine, that is okay, but what we are doing, and what the Minister is proposing, is effectively a significant administrative easement and allowing decisions to be made for people who are incapable of looking after their own affairs and, as we look at an ageing society, there is going to be more and more and this is the point. The point has been made about the Judicial Greffe for people with no assets has acted as the curatorship working with the flexible court system and the burden this has put on our Judicial Greffe's Department has been absolutely enormous. The old system just does not work. It is too cumbersome. It might have worked in a world where people died at the age of ... average age of life expectancy was 55 and there were not many of these things and all the rest of it. But we are not living in that world anymore and we also understand what mental incapacity means and the fact that at the centre of this should be the individual rather than a cumbersome arrangement which simply did not meet the desired and expected wishes of the person who is not able to take their decisions for themselves. Sometimes they understand and sometimes they do not, so I say that, firstly, we should almost not be having this debate because it should have been dealt with at a committee stage. But secondly, there is no reason why, and I am sure Senator Ferguson is not saying that she is not going to support this part of the law because it is a massive improvement. It is good for the people. It is good for the people who are charged with the difficult responsibility of looking after people with issues and also it can be made to work and work properly and more efficiently and it will ease the huge burden that the Judicial Greffe has had over so many years. I support it.

1.4.3 Deputy M. Tadier:

Just on a procedural matter we have a Minister who stands up suggesting that this should have been looked at in a committee stage and that Scrutiny should pick up on this kind of thing. It would be good to know whether or not the Ministers themselves asked for this to be put to Scrutiny in advance so they could look through the areas. Of course, they are a busy panel anyway but I think it is too easy for a Minister to stand up and say: "A new Senator should not be coming into the Assembly and bringing these issues now. This should have been dealt with before." Of course, the issue of legislative scrutiny is a critical one and I think that is partly why the Minister is taking these Article by Article because it is important that these things are debated and no doubt he may have taken counsel from other senior Ministers to make sure that these things do get aired. It is quite right the place to do it and, of course, the general issue of when legislative scrutiny happens is a good one. But the point remains that Senator Ferguson's questions are quite legitimate. If she is saying that there is not sufficient probity in what is currently being presented to the Assembly and that what is quite reasonable that accounts should be presented are not in the current law, can the Minister give an assurance that when it comes back in the Regulations these provisions will be there? I think it is unfortunate for Members to feel they are in a position of voting for something blind and then finding out maybe a few months or years down the line that the relevance safeguards they would have wished to be put in law have not appeared in the Regulations and therefore regret

the decision they have made today. I think that is a reasonable request, irrespective of what stage Scrutiny is or could have been taken carried out.

The Greffier of the States (in the Chair):

If no other Member wishes to speak on these Articles I call the Minister.

1.4.4 Senator A.K.F. Green:

Picking up on Deputy Tadier's comments, firstly; we did discuss the matter with the Scrutiny Panel, who are a very busy panel. At the moment among other things they are scrutinising the work around the need for a new hospital and the hospital site. They did cast an eye over it and decided that they would prefer - I do not want to put words in the mouth of the Chairman - to scrutinise the Regulations. He is nodding, so there was some discussion with the panel about that. Picking up on your second point around whether accounts should be present and Senator Ferguson's point as well, Senator Ferguson has been consistent in her comments about that, to be fair. I can remember standing at the Town Hall and having that discussion as well. I think there is some confusion about the role of the person with power of attorney and the delegate. The delegate is somebody appointed by the Royal Court because an attorney had not been appointed and the court is free to put any conditions on that they wish. When it comes to the attorneys then what I did say is we are trying to make a simpler but fair system. Nevertheless it has to be responsible and I did say when we are looking at regulation, look at whether it would be appropriate to ask people to keep accounts and then to be available for inspection. It may be that people with assets below a certain level would not need to. It may be that the spouse would not need to have carried on running the household in the normal way. These are things that I guarantee we will look at under Regulation. We have not dismissed it but I am trying to get a user-friendly system but also understand the need to be sensitive to ensure that people are not defrauded of their assets. With that I call upon the Assembly to approve 24 to 36.

The Greffier of the States (in the Chair):

The appel has been called for on Articles 24 to 36. I ask Members to resume their seats. I ask the Greffier to open the voting.

POUR: 32		**CONTRE: 0**		**ABSTAIN: 0**
Senator P.F. Routier				
Senator P.F.C. Ozouf				
Senator I.J. Gorst				
Senator L.J. Farnham				
Senator A.K.F. Green				
Senator S.C. Ferguson				
Connétable of St. Lawrence				
Connétable of St. Mary				
Connétable of St. Ouen				
Connétable of St. Martin				
Connétable of Grouville				
Connétable of St. John				
Deputy J.A. Martin (H)				
Deputy of Grouville				
Deputy J.A. Hilton (H)				
Deputy J.A.N. Le Fondré (L)				
Deputy of Trinity				
Deputy M. Tadier (B)				
Deputy of St. John				
Deputy S.J. Pinel (C)				

Deputy of St. Martin				
Deputy of St. Peter				
Deputy R.J. Rondel (H)				
Deputy S.Y. Mézec (H)				
Deputy of St. Ouen				
Deputy L.M.C. Doublet (S)				
Deputy R. Labey (H)				
Deputy S.M. Wickenden (H)				
Deputy T.A. McDonald (S)				
Deputy of St. Mary				
Deputy G.J. Truscott (B)				
Deputy P.D. McLinton (S)				

1.5 Senator A.K.F. Green:

We are well on the way now. I know this is tedious for Members but these 2 laws that we have been doing over the last couple of days I believe will be the most important laws this Assembly will debate and I think it is right that rather than just *en bloc*, which we sometimes do with some things, we do examine, challenge and ask questions about the different Articles. I do not apologise but I do acknowledge that I am taking a long time but also I am in the seat of former Senator Le Marquand that used to like to do that as well. In part 5 we are looking at capacity and liberty. In some cases where a vulnerable person cannot consent to the arrangements for their care and 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 from coming to harm. Article 37 is the interpretation and provides the provision for those purposes of part 5. 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 that affords them the opportunity to challenge the imposition of these restrictions in an independent and impartial tribunal. Article 38 provides that basic safeguard which is that a sufficient restriction which might amount to deprivation of liberty may be imposed only and only if in respect of a person lacking capacity an urgent or standard authorisation of such a deprivation has been granted by the Minister or an order of the court has been made granting a similar authorisation 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 them to continuous supervision.

[11:30]

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 in the approach to their care. In England special provision was made in the Mental Capacity Act 2005 to insert a provision for the deprivation of liberty safeguards, referred to as D.O.L.S. D.O.L.S. 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 nature of the 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 or her own decision about whether to be accommodated in hospital or in a care home after treatment and whether it is necessary in her or his best interests to be deprived of

their liberty. However, while D.O.L.S. provide a process for protecting patients' rights they have been the subject of a great deal of criticism in the U.K. In particular there has been criticism of the complexity of the regime and the limitations on the application since it does not apply to places outside hospitals and care homes. There has also been confusion about how the regime should be applied in combination with detention powers of the mental health legislation. Therefore part 5 of the law contains appropriate alternative statutory safeguards to those found in the Mental Health Law to authorise significant restriction on the liberty of a person who lacks capacity in any environment where they may be provided with health and social care. Part 5 makes arrangements so that such restrictions as are authorised are kept under review and may be challenged. By doing so Jersey can be sure that its obligations under the Human Rights (Jersey) Law and Article 5 of the European Convention of Human Rights are met. The content of part 5 has a careful balance in line with the feedback from the consultation exercises between a robust procedural safeguard and ensuring the system is straightforward and easy to apply in practice. The aim is to ensure the assessments under part 5 can be conducted by the same persons who are conducting assessments for social work purposes generally under the Long-Term Care (Jersey) Law. In particular, the persons carrying out those assessments will be trained to assess capacity and the best interests so that they will be well-equipped to carry out the assessments required under Part 5. 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 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 care for them in a way that protects them from harm. The registered care professional will assess whether the person has capacity to consent to the proposals for their treatment and if not, whether those arrangements would involve a significant restriction on liberty and that it is necessary and in the best interests of the patient. The shift in terminology away from referring to deprivation of liberty under D.O.L.S. towards referring to significant restrictions on liberty is an important one. This move is both inspired by the difficulties in explaining to practitioners what deprivation of liberty is and also the recent reports that we have had from the Scottish and the U.K. Law Commissions. Both Commissions recommend that a process should be put in place to authorise any significant restrictions on liberty because unlike the deprivation of liberty it is a concept that can be defined without jurisdiction by reference to the European Court of Human Rights 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 law in a way that should be clear to service users and professionals and would capture the types of restrictions that could be said to give rise to a deprivation of liberty or to amount to an interference with the right to private and family life. Article 40 imposes a duty on the Minister to designate independent assessors who must be registered medical practitioners or persons otherwise in registerable occupations under the Health Care Registration (Jersey) Law and they carry out assessments under part 5 of this law. It confers the 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 authorise a significant deprivation of liberty unless the authorisation is urgent as defined by Article 42, where an assessment has been carried out in accordance with Articles 43 to 46 which have concluded that significant deprivation of liberty is justified. Under Article 41(2) the Minister must appoint an assessor to carry out initial assessments upon receipt of such a request or where the Minister otherwise becomes aware of conditions in Article 43(2) are fulfilled. Article 43 provides that where a person lacks capacity or is or will be subject to a significant deprivation of liberty in the relevant place the manager must notify the Minister of those matters and must request an assessment of the person. The assessment conducted by the registered professional under part 5 must be conducted in accordance with the Articles 44

and 45 and it must be supported by appropriate medical opinion. This may arise from the person's medical records or from an interview with the medical practitioner responsible for the person's care and treatment. The assessment may also take account of interviews with the representations from such other persons that are listed in Article 44 and who may in the assessor's view be appropriate. These include the person's guardian, its nearest relative or delegate appointed under part 4. The assessment must be such as to enable the assessor to form a view whether the person lacks capacity to consent to the arrangements for his or her care and whether it is necessary to impose significant restrictions 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. At the conclusion of the assessment the assessor must prepare a written report setting out their conclusions on the following questions. Back to Mr. P. or Mrs. P. or Miss P.; does P. lack capacity with reference to the question whether or not he or she consents to the arrangement for his or her care? With regard to P., is it necessary to impose any significant restrictions on P.'s liberty in the interests of P.'s health or safety, and, having regard to the general principles and provisions of law, is it in P's best interests to be provided with care in circumstances where a significant restriction on his or her liberty will be applied? The registered assessor's report should set out the recommendations as to the nature of any significant restrictions on P's liberty, and why that registered assessor thinks it is necessary to impose. Article 45 requires the assessment to be provided to the Minister within 21 days of the appointment of the assessor, and to include such matters that are specified in the Article. Article 45 also requires a copy of the report to be given to the manager. All assessments must be submitted to the Minister, who will be responsible for ensuring that the application is properly made and that, if recommended, confirms that the imposition of significant restrictions are authorised. In practice, this role might be performed by the mental health administrator, whose role is provided for under the new law that we debated yesterday. An authorisation would allow a care provider to impose one or more significant restrictions on someone's liberty. If the report that the assessor has made considers that the imposition of significant restriction on liberty is justified, and the effect of Articles 46 and 48 is that the Minister may authorise significant restrictions for a period of no more than 12 months, referred to in the law as a standard authorisation. In general this would be for a maximum of 12 months, with an option to renew for a further 12 months. This pattern of review has the advantage that it may coincide with the pattern of review for care plans for 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 people who would be subject to part 5 authorisations will have permanent learning difficulties or degenerative illnesses where there is a much lower likelihood of a recovery, improvement, or change in the person's circumstances in a short period of time. Once authorisation is in effect, the manager and staff of the care home have the authority to impose restrictions on P's liberty, they should suffer no liability for acts done for the purpose of maintaining 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 of civil liability for loss or damages or criminal liability resulting from that. However, the manager who has given authority to impose significant restrictions on P's liberty must keep the necessity to maintain any restrictions under review at all times. If at any time the manager considers that it is no longer appropriate to maintain the restrictions, they should cease to do so. The system for challenging the imposition of authorisations under part 5 of the law will be similar to those of challenging the compulsory detention under the Mental Health Law, i.e. the Mental Health Review Tribunal should be the forum in which the challenge could be heard, because issues involved in such cases have a close affinity with the challenges that may be brought concerning the detention under the Mental Health Law. There will need to be specific and special rules of procedure for the cases under the law compared with the cases under the Mental Health Law. This is something that will be considered further as part of the implementation process of the law. Similar to Article 12 of 1969 within the Mental Health Law, where a person has not already been admitted to a place where authorisation has been given to

impose significant restriction on the person's liberty, then the authorisation - whatever type it may be - should be treated as providing sufficient authority for the registered assessor or manager, or any other person authorised by persons to take that person and convey him or her to a place of significant restriction of their liberty. This may be lawfully imposed at any time within 72 hours of the grant of the authorisation. The Minister may, by order, prescribe the forms that shall be used by all of those carrying out assessments and authorisations. The Minister may give urgent authorisation to impose significant restrictions on liberty, where it is necessarily so in the interests of P's health and safety, allowing the managers to impose significant restrictions on P's liberty. The urgent authorisation may last until the assessment is completed and an authorisation is granted, for no longer than 28 days in total. The Royal Court will 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 authorises the imposition of significant restrictions on that liberty. The Royal Court may only make an order authorising the imposition of serious restrictions on P.'s liberty where it has received evidence from a medical practitioner and is satisfied that P. lacks capacity, and it is necessary - and this is really important - in P.'s best interests to impose that significant restriction on his or her liberty.

[11:45]

Once in place, authority provided by the Royal Court to impose a significant restriction on liberty should be treated for the most purposes in the same way as authority to provide a standard authorisation. Article 46 provides that if an assessment is negative, no further assessment may be carried out and no standard authorisation may be granted to impose deprivation of liberty, except where there is a material change justifying a fresh application for assessment, or an assessment has been carried out and was mistaken in a material respect. Article 47 requires the Minister to keep a record of all assessments carried out and all authorisations given under part 5. Article 48 obliges the Minister to give notice - in a form to be specified by code of practice - of the authorisation to the manager of the relevant place and to the assessor. Article 48 also makes provision as to the powers of the Minister to authorise restrictions that are recommended by assessors. 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, and that the recommendation is, therefore, disregarded. Article 50, the person affected by the restriction must be notified of it, and all the rights of advocacy, support and review available under the 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. If the person has no such representative at the time, Article 51 provides that the Minister should appoint an independent capacity advocate in accordance with part 6 to represent the person in a significant deprivation of liberty situation. A standard authorisation may not be renewed, except in accordance with Article 52. The Minister may, as soon as practical, appoint an assessor to carry out a renewal assessment and if the report of that assessment is affirmative the Minister may renew a standard authorisation or request a further medical assessment. Further mechanisms for review of authorisations are Articles 53 and 55. Article 53 imposes a duty on the manager concerned to keep under the review the necessity for every significant restriction authorised by a standard authorisation. Article 54 preserves the continuity of an authorisation where there is a change in the identity of the manager of a relevant place. Article 55 provides for the review of authorisations by the Tribunal, on the application of the person concerned or his representative, the Minister, or the Attorney General. Only one such application may be made during a continuation of a standard authorisation. Article 55 confers an

order making power to ensure that the provision to be made as to applications to, and proceedings before, the Tribunal, and the Tribunal's powers to dispose of applications. Article 55 goes on to set out the Tribunal's general duties, and Article 56 enables the Minister to monitor the application and use of authorisations, and the operation of significant deprivation of liberty. Article 57 gives the Royal Court the power to make an order authorising the imposition of significant restrictions on liberty, where a person lacks capacity to give consent to the arrangements for his or her care or treatment, and it is necessary. Again, back to the same old thing, necessary but in the interests of the person's health and safety, or in their best interests. To be valid the order must comply with Article 57. Article 59 makes it lawful for one person to temporarily impose significant restriction on another's liberty where the restriction is essential for the purpose of administering lifesaving treatment. Article 60 provides that an authorisation - including an order of the court - under Part 5 is sufficient authority for a person to whom it relates to be taken and conveyed to a relevant place and admitted and detained there for a specified period in the authorisation. Could I ask the Assembly to approve Articles 37 to 60?

The Greffier of the States (in the Chair):

Are the Articles seconded? **[Seconded]**

1.5.1 Senator S.C. Ferguson:

I am making up for lost time. Basically I do not understand quite where the 12-month figure comes from. Perhaps I have misunderstood it but it seems that there is a report and an assessment and that then puts somebody into, effectively, a safe place for 12 months, which seems somewhat draconian. There is only one allowable review of the authorisation by a Tribunal. Now, I understand it is slightly different in the U.K. where there is an automatic review, I think, after 6 weeks, is there not? So perhaps the Minister would like to put me right on that one.

1.5.2 The Deputy of St. John:

I hope it is a simple question. Article 59, which talks about the temporary restriction of liberty for purpose of life sustaining treatment, I am just trying to understand how that fits with regards to the advanced decision, I think it is part 2 or part 3 of the law, which we have agreed. I would just like some understanding of the practicalities of that, especially when it is a situation that you need to make that decision at the last minute, or they may have placed within their advanced decision certain treatment that they need at that particular time. So I would just like to understand fully how that would work.

1.5.3 The Deputy of Grouville:

This goes back to my earlier point, and I have to say I was not altogether comforted by what the Minister said in that: "That is the law of the land, end of." I think the law of the land needs to be looked at when we are bringing this kind of legislation in, because there seems to be some sort of inconsistency and conflict in this legislation. Going back to my earlier point on making a living will, not to have one's life prolonged if a person is incapacitated in some way, and has no chance of having their life improved, they have no prospect of their life getting better. There seems to be some conflict between the person's wishes, the deprivation of liberty, and doing what that person considers to be in their own best interests because they made a living will before they lost capacity to make their own decisions and do things about it. I understand, and I am obviously going to vote for this because it is a vast improvement in principle, but I think when we go through the Regulations I will want some detail and I will want all these things about deprivation of liberty and a person's best interest considered to the full. It might just be that we need to sort of bring forward additional legislations or propositions to have a look at the law of the land.

The Greffier of the States (in the Chair):

Does any other Member wish to speak? Minister?

1.5.4 Senator A.K.F. Green:

Dealing with the Deputy of Grouville first, I may need the help of the Solicitor General on this one but for me it seems quite clear that if someone has made it clear by doing the appropriate paperwork, and all the rest of it, that they do not wish to have life-sustaining treatment, that is one thing. But they cannot ask somebody to deprive them of their life. That would be manslaughter or murder, I do not know, I am not a lawyer. So to withhold treatment because a person has asked for that to be withheld when they had capacity is one thing, but to advance their death would be illegal. I do not know if the Solicitor General has a comment to make on that.

The Solicitor General:

Yes, I agree with that distinction. I note that in Article 57(6) of the draft law that where a person has made an advance notification concerning their treatment and not to receive treatment, and they have complied with the formalities and the terms of it are clear, then not even a court has the ability under this law to make an order that they be treated contrary to the terms of that notification. So it is a significant protection for the person's wishes, provided that they have complied with the requirements for that notification. I hope that assists the Minister.

Senator A.K.F. Green:

I do not know if that helps the Deputy of Grouville.

The Deputy of Grouville:

Well, my point is it is illegal now but I would like it considered so maybe we can take these factors into account, and so other possibilities make it not illegal.

Senator A.K.F. Green:

I am sorry, I think we will have to agree to disagree on that, although I will have a chat with the Deputy afterwards to see if I have misunderstood, because at the moment we are doing the principles and the Articles, and of course the Regulations - as the Deputy said when she was speaking earlier - come later. So I will have a chat with her later to make sure I have not misunderstood what it is she is trying to tell me. Senator Ferguson - and again I am not a lawyer - raised the 12-month on review. The 12-month standard is normally used where someone has a condition not likely to be improved, as I understand it, but there is still a review within that. The Deputy of St. John asked me was the fact that, for example, Accident and Emergency could give treatment because a person did not have capacity, was that not against their living will. No, because the living will is in place and treatment will not be given. But if lifesaving treatment is needed and there is no indication that that person does not want to have that, and the person has no capacity - it may be that they are unconscious - then the medical practitioner has to make a decision in the best interests of the patient. Does that make sense? I am getting a strange look.

The Deputy of St. John:

I was trying to think of it in my head. In one note you were saying that for the life-sustaining treatment, as long as it is not listed in their advance decision, then that can be given because of Article 59. But if it is the best interests and it is in the advance decision ... sorry, I just need to clarify ...

Senator A.K.F. Green:

No, I am not saying that. What I am saying, if there is an advance decision that they do not want to have that life-saving treatment then their decision is respected. If there is not an advance decision, that the person does not have capacity, then life-sustaining treatment can be given without putting

the doctors and the surgeons at risk of prosecution. Does that make sense? Okay, thank you. On that basis, I call upon the Assembly to vote on Articles 37 to 60.

Senator S.C. Ferguson:

Can I have clarification, Sir? I did ask where the figure of 12 months came from.

Senator A.K.F. Green:

I cannot say exactly where the figure of 12 months came from but it was ... and I did mention that it was recognised that those are normally used where somebody has a condition not likely to improve. But, other than that, I will have to speak to the Senator separately.

[12:00]

The Greffier of the States (in the Chair):

All those in favour ... Solicitor General?

The Solicitor General:

If it assists Senator Ferguson, it is ... the standard authorisation specifies that it is for a period of no longer than 12 months. So it is up to 12 months; it does not have to be 12 months. Presumably, if the Minister or medical practitioner is of the view that the period of restraint, it can be dealt with in less than 12 months, then they would say a lesser period and in fact there would be, I think, an obligation on them to do so under this law.

The Greffier of the States (in the Chair):

Minister, have you concluded your ...?

Senator A.K.F. Green:

Yes, thank you, Sir. So could we have Articles 37 to 60, please?

The Greffier of the States (in the Chair):

All those in favour of Articles ... the appel has been called for in Articles 37 to 60. I ask Members to resume their seats and I ask the Greffier to open the voting.

POUR: 35		**CONTRE: 0**		**ABSTAIN: 0**
Senator P.F. Routier				
Senator A.J.H. Maclean				
Senator I.J. Gorst				
Senator L.J. Farnham				
Senator P.M. Bailhache				
Senator A.K.F. Green				
Senator S.C. Ferguson				
Connétable of St. Peter				
Connétable of St. Lawrence				
Connétable of St. Ouen				
Connétable of St. Martin				
Connétable of Grouville				
Connétable of Trinity				
Deputy J.A. Martin (H)				
Deputy of Grouville				
Deputy J.A. Hilton (H)				
Deputy J.A.N. Le Fondré (L)				
Deputy of Trinity				
Deputy K.C. Lewis (S)				

Deputy M. Tadier (B)				
Deputy E.J. Noel (L)				
Deputy of St. John				
Deputy S.J. Pinel (C)				
Deputy of St. Peter				
Deputy R.J. Rondel (H)				
Deputy S.Y. Mézec (H)				
Deputy A.D. Lewis (H)				
Deputy L.M.C. Doublet (S)				
Deputy R. Labey (H)				
Deputy S.M. Bree (C)				
Deputy M.J. Norton (B)				
Deputy T.A. McDonald (S)				
Deputy of St. Mary				
Deputy G.J. Truscott (B)				
Deputy P.D. McLinton (S)				

1.6 Senator A.K.F. Green:

We are close to the end but I am not going to apologise. This is really, really important. Part 6 is "Independent Capacity Advocates". This part of the law makes provision so that, in particular, when 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, to be referred to as an I.C.A. This is covered in Article 61. Article 62 enables the States by regulation to require the Minister to make arrangement for the appointment of such Independent Capacity Advocates. Under Article 62, the Minister must have regard for the principle that a person must be represented by another who is independent of that, any person responsible for the decision in question. Article 63 sets out the basic functions of an I.C.A., which includes supporting the person to participate as fully as possible in any decision concerning him or her to obtaining and evaluating information in relation to representing and supporting a person or that person's best interests, obtaining further medical opinion and ascertaining alternative courses of action, if any. That is covered under Article 63. Regulations may also make provision as to the circumstances when an I.C.A. may challenge or assist a person in challenging decisions affecting him or her or his or her best interests under this law. The I.C.A. will be somebody who is independent with a knowledge of law but not necessarily a lawyer. The I.C.A. will be appointed to support a person who lacks capacity and may be particularly important where a person has no family or friends, who would normally be able to represent their wishes and their feelings. The Health and Social Services Department anticipates that this role will continue to be funded by the department but provided by a voluntary or community organisation. In particular, Independent Capacity Advocates are to be involved in decisions as to serious medical treatment and 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 the power to make such a decision. Articles 64 and 65 respectively provide that an I.C.A. 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 or serious medical treatment and this defined in Article 64. As Article 64 proposes a 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 treatment for that person, the I.C.A. will be able to make representations about the person's wishes, their feelings and their beliefs and values at the same time as bringing to the attention of the decision maker all the factors that are relevant to the decision. Detailed provision about the role of the I.C.A. may be made by the States Assembly by regulations, including with regard to the circumstances where they may be

appointed and the roles that they may perform. Articles 61, 64 and 65 of the law make provision about the circumstances where the Minister might appoint an I.C.A. to support a person in relation to decisions about the imposition of significant restrictions on the person's liberty. I call upon the Assembly to approve Articles 61 to 65 and that is part 6 of the law.

The Greffier of the States (in the Chair):

Is the Article seconded? **[Seconded]** Does any Member wish to speak on Articles 61 to 65? If not, all those in favour of Articles 61 to 65, kindly show. Those against? The Articles are adopted. Minister?

1.7 Senator A.K.F. Green:

Finally, part 7 "Miscellaneous and General Provisions". Part 7 contains general and miscellaneous provisions, 2 of which create additional and 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 be lawfully undertaken and 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. There have been a number of cases in the U.K., and also Jersey for that respect, where neglect or abuse of a vulnerable person has caused some harm. A care worker who mistreats or abuses a person that they are caring for might potentially also be prosecuted for other offences against the person, such as assault. However, it may not always be that straightforward to prosecute such offences, especially when the person is not capable of consenting to the manner of their treatment. The Regulation of Care (Jersey) Law 2014 will enable the States to create a regulatory framework for Health and Social Care that places the responsibility for quality of care and criminal liability on the managers and the providers of regulated health and social care activities. Criminal liability may arise from their failure to comply with the conditions of registration or from failure to comply with other requirements by virtue of Articles 13, 14 and 1 and 6 of that law. However, it is only the registered provider, i.e. the owner and the manager, who are responsible for the institutional failings of this nature. They are the ones, therefore, that would be liable for prosecution in that case. The law does not contain new offences for care workers themselves. They would continue to be prosecuted under the existing, general criminal law and potentially under the 1969 Law where that applies. With this in mind, Article 67 of the 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. An offence of this nature is provided in section 44 of the 2005 Act. However, as the U.K. Government noted, there are potential shortcomings in respect of section 44, which is that it only applies to a person who has the care of a person who lacks capacity or other persons with a specific responsibility for the person who lacks capacity. This means that 2 vulnerable service users, one of whom has capacity, one of whom does not, who may experience the same ill treatment or wilful neglect may not be equal victims in respect of those acts. So rather than creating a parallel offence to that in section 44 of the 2005 Act, the Health and Social Services Department 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 the primary care services and the hospital. The offence should apply to those who care for persons with mental capacity ... or without mental capacity. It should also apply to persons who have specified responsibility in relation to a person who lacks capacity. For the purposes of this offence, a person should be treated as having the care of P. if they are responsible in giving health or social care to P. (that is my Mr. and Mrs. P., again) as part of the activity that is not a regulated activity for the purposes of the Regulation of Care

(Jersey) Law. I want to be absolutely clear here, for the avoidance of any doubt, it is not intended to capture anyone within the scope of this offence who is employed by a business providing regulatory health care and social care to P. It is not intended that new offence should capture family members or neighbours who, while might also neglect or ill-treat P, would not be providing regulatory services, unless they do so for a commercial consideration. To do otherwise might dissuade people from volunteering from being that good neighbour and popping in 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. Article 67 of the law provides that a person guilty of an offence under this section is liable to a term of not exceeding 5 years in prison, a fine, or both. Article 68, the Minister must issue codes of practice relating to the exercise of functions under the law by carers and donees and those with lasting powers of attorney, delegates and assessors. Failure to comply with the codes of practice is admissible as evidence where relevant to a question arising in criminal or civil proceedings, though such failing does not, itself, amount to a liability. 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 the power to provide the amount of fees and charges under the law. Article 71 would extend the power to make the rules of court under the Royal Court (Jersey) Law to include the powers to make rules regulating the practice or procedures before the Court. Article 72 would provide for the capacity law concerning curatorship to cease to have effect at the appropriate time. Article 73 would provide the citation of this law. I call upon the Assembly to approve the last Articles 66 to 73.

The Greffier of the States (in the Chair):

Are the Articles seconded? **[Seconded]** Does any Member wish to speak on Articles 66 to 73? Deputy Rondel?

1.7.1 Deputy R.J. Rondel St. Helier:

Just under Article 67 "Offence of wilful neglect", could the Minister please explain where under 3: "A person guilty of an offence under this Article shall be liable to imprisonment for a term of 5 years and a fine." Where did the figure of 5 years come from? Because, am I right in thinking this could lead to somebody's death?

Senator A.K.F. Green:

The offence is one that ...

The Greffier of the States (in the Chair):

Can we just ...

Senator A.K.F. Green:

I am sorry; I beg your pardon.

The Greffier of the States (in the Chair):

Do any other Members wish to speak on the Articles? If not, Minister.

1.7.2 Senator A.K.F. Green:

I may need the guidance of the Solicitor General but the offence is one of wilful neglect rather than causing the death of somebody and, as I understand it, it reflects the U.K. law in terms of the 5-year punishment. But I cannot go further than that. I do not know if the Solicitor General can help me.

The Solicitor General:

The offence does reflect the maximum sentence in the U.K. law and if it had resulted in someone's death then I think prosecution for an alternative offence would be considered rather than under this one.

Senator A.K.F. Green:

I cannot add anything to that; that was my understanding although put much more articulately by the Solicitor General. On that basis I ask Members if they would approve Article 66 to 73.

The Greffier of the States (in the Chair):

Those in favour of Articles 66 to 73 kindly show. Those against? The Articles are adopted. We come to Third Reading, Minister.

1.8 Senator A.K.F. Green:

The need for capacity legislation in Jersey is beyond doubt.

[12:15]

England introduced their Act in 2005 while Scotland introduced their Adults with Incapacity (Scotland) Act in 2000. Importantly though we have been able to learn from the implementation and practical problems that these 2 pieces of legislation experience. We recognise the value of the principles of the capacity test and best interest decisions within the English law and that is why they have been included within our legislation. However we also saw confusion surrounding the deprivation of liberty safeguards and subsequent Supreme Court rulings to ensure that our legislation has learnt from and improved on other jurisdictions' legislation. We are the first, if we accept this today, jurisdiction to recognise the importance of self-determination within the capacity law. This law will give the citizens of Jersey the power to make decisions for themselves for a time when they may not have capacity to do so in the future. It provides a legal framework to protect the most vulnerable of people in our society. It leaves us in no doubt that whatever we do for people who lack capacity to choose for themselves, whatever we do it must be done in their best interests. The consultation has been comprehensive. I would like to personally thank the voluntary organisations who have contributed so much time and effort into the process, particularly Mind Jersey, and I am really grateful for the work that Mind Jersey perform **[Approbation],** Mencap, Self-Advocacy Project, Age Concern and Citizens Advice Bureau. I would also like to express my thanks to the Law Officers, the Law Draftsman, officers from the Chief Minister's Department, offices from my own department who in completing this substantial piece of legislation in just over 2 years is noteworthy, but we have ensured that it has been completed in tandem with the Mental Health Law that demonstrates the commitment and the drive from this Assembly but also all the staff and people involved, all the different agencies to ensure people with mental health problems and challenges are treated with the respect and dignity that they deserve. With that, I ask the Assembly to approve this legislation; and I ask for the appel.

The Greffier of the States (in the Chair):

Does any other Member wish to speak on Third Reading?

1.8.1 Senator L.J. Farnham:

I just wanted to say that as an observation there have been one or 2, albeit mild good-natured, grumbles about the length of the time it has taken the debate the last 2 propositions, but I think with sometimes the amount of trivia we do get involved in it is really important that we take the time on such important debates. I have been following both pieces, Article by Article, as ably led through by the Minister for Health and Social Services, and I have certainly come out of this debate with a much better understanding as I came into it with because of that, because of the time taken to go through it. I think the questions by Members have been excellent and very ably handled by the

Minister for Health and Social Services. I am saying this because I think if we all spent more time on serious and important debates like this, and less time trying to tear each other to pieces, this Assembly might just be a much more productive place.

The Greffier of the States (in the Chair):

If nobody else wishes to speak, Minister, do you wish to move straight to the ...

1.8.2 Senator A.K.F. Green:

I would just like to thank Senator Farnham for what he said. I spent 2 hours this morning seeing if I could substantially cut out bits of what we covered under the different Articles. When you do that then the Members would not get the full flavour for what we were trying to achieve and it threw everything out of context. I am really grateful to Members for putting up with me for this length of time. But I will say it again, these 2 laws, yesterday and today, I believe are probably the most important bits of legislation, certainly for the people of Jersey, that this Assembly will pass. With that, I ask for the appel. **[Approbation]**

The Greffier of the States (in the Chair):

The appel has been called for in the Third Reading of the draft law. I ask Members to resume their seats. I ask the Greffier to open the voting.

POUR: 46		**CONTRE: 0**		**ABSTAIN: 0**
Senator P.F. Routier				
Senator P.F.C. Ozouf				
Senator A.J.H. Maclean				
Senator I.J. Gorst				
Senator L.J. Farnham				
Senator P.M. Bailhache				
Senator A.K.F. Green				
Senator S.C. Ferguson				
Connétable of St. Helier				
Connétable of St. Clement				
Connétable of St. Peter				
Connétable of St. Lawrence				
Connétable of St. Mary				
Connétable of St. Ouen				
Connétable of St. Brelade				
Connétable of St. Martin				
Connétable of St. Saviour				
Connétable of Grouville				
Connétable of St. John				
Connétable of Trinity				
Deputy J.A. Martin (H)				
Deputy of Grouville				
Deputy J.A. Hilton (H)				
Deputy J.A.N. Le Fondré (L)				
Deputy of Trinity				
Deputy K.C. Lewis (S)				
Deputy M. Tadier (B)				
Deputy E.J. Noel (L)				
Deputy of St. John				
Deputy S.J. Pinel (C)				
Deputy of St. Martin				
Deputy R.G. Bryans (H)				

Deputy of St. Peter				
Deputy R.J. Rondel (H)				
Deputy S.Y. Mézec (H)				
Deputy A.D. Lewis (H)				
Deputy of St. Ouen				
Deputy L.M.C. Doublet (S)				
Deputy R. Labey (H)				
Deputy S.M. Wickenden (H)				
Deputy S.M. Bree (C)				
Deputy M.J. Norton (B)				
Deputy T.A. McDonald (S)				
Deputy of St. Mary				
Deputy G.J. Truscott (B)				
Deputy P.D. McLinton (S)				

2. Comptroller and Auditor General Board of Governance: appointment of members (P.80/2016)

The Greffier of the States (in the Chair):

We move on to the next proposition which is Comptroller and Auditor General Board of Governance: appointment of members. I ask the Greffier to read the proposition.

The Deputy Greffier of the States:

The States are asked to decide whether they are of opinion – in accordance with Article 3 of the Comptroller and Auditor General (Board of Governance) (Jersey) Order 2015, to appoint – Mr. Peter Price as Chairman and Professor Russell Griggs, O.B.E. as a member of the Board of Governance of the Office of the Comptroller and Auditor General, both for a period of 4 years, with immediate effect.

2.1 Senator I.J. Gorst (The Chief Minister):

This is a proposition to appoint Mr. Price and Professor Griggs as the first appointees to the Comptroller and Auditor General Board of Governance. There is a full report and C.V.s (*curricula vitae*) there. I think these people are 2 eminent people to start this board and I am sure that the Comptroller and Auditor General herself is going to find it extremely worthwhile, supportive and enhance the role that she plays in delivering good value across government. I hope that she will find these 2 individuals to be eminent in that role and I ask Members to support their appointment.

The Bailiff:

Is the proposition seconded? **[Seconded]** Does any Member wish to speak?

2.1.1 The Deputy of St. John:

I just want to ask the Chief Minister, looking at the members of the panel that interviewed these individuals, can I ask why a member of the P.A.C. (Public Accounts Committee) was not on that panel for interview?

The Bailiff:

Does any other Member wish to speak? Chief Minister.

2.1.2 Senator I.J. Gorst.

I thank the Deputy for her question. I do not know why they were not, just in the same way that I was not. It was a panel made up of officials and Members will see who were on that panel, but

neither the Chairman of P.A.C. nor myself were on that panel, and I am not sure whether the subject was approached or not, it is some time ago now.

The Bailiff:

Members in favour of the proposition kindly show. Those against? The proposition is adopted.

3. Draft Proceeds of Crime (Miscellaneous Amendments) (Jersey) Regulations 2016 (Appointed Day) Act 201- (P.86/2016)

The Bailiff:

We now come to the Draft Proceeds of Crime (Miscellaneous Amendments) (Jersey) Regulations 2016, P.86, Appointed Day Act, lodged by the Chief Minister. I ask the Greffier to read the proposition.

The Deputy Greffier of the States:

Draft Proceeds of Crime (Miscellaneous Amendments) (Jersey) Regulations 2016 (Appointed Day) Act 201-. The States in pursuance of Regulation 5 of the Proceeds of Crime (Miscellaneous Provisions) (Jersey) Regulations 2016 have made the following Act.

Senator I.J. Gorst (The Chief Minister):

I would like to ask Senator Ozouf to act as rapporteur as he brought the initial legislation and it falls within his remit.

3.1 Senator P.F.C. Ozouf (Assistant Chief Minister - rapporteur)

This is the Appointed Day Act for the Draft Proceeds of Crime (Miscellaneous) Regulations and the underlying Regulations were passed by the Assembly on 15th June. I am sure Members will recall those Regulations and they concern the important issue of virtual currencies. Members may find it slightly unusual that we have got an Appointed Day Act for regulations however this was done to ensure that the subordinate legislation in the form of 2 orders would be ready to be made and that the Financial Services Commission, who will receive the notifications and registrations of those carrying out virtual currency exchange business, are ready to receive applications. I am happy to confirm to the Assembly that the subordinate legislation in the form of those 2 orders have been prepared. J.F.S.C. (Jersey Financial Services Commission) are ready to begin receiving notifications and registrations from 26th September 2016, subject to the States passing this Appointed Day Act. They will have been of course made into the normal way and I would ensure that the Scrutiny Panel has those orders that they can be dealt with so that hopefully they are happy and the order will be made in the usual way. If adopted, the Appointed Day Act will bring all of these Regulations and then the orders, once they are done, into place. Of course I am not going to go into the detail of what this is all about because we have already discussed it. But I think it is probably just worth saying just 2 or 3 things. Members will be familiar with the focus that this Government and other governments around the world have been focusing on FinTech, so Members will be aware that there is a huge opportunity in the post-Brexit world even greater than ever in FinTech, and I was very pleased to be considering a lot of these things with Deputy Wickenden in Estonia just last week, and seeing how Estonia has moved ahead in the area of FinTech. Technologies that are being developed have massive economic implications for Jersey, as an international financial centre, and for the world at large. Ultimately the technologies that this legislation bring into effect will revolutionise literally the way that we bank, invest, make transactions and the ways that companies raise money. This legislation is one of a whole series of pieces of legislation but I would say that ours is better almost, as I said in the original regulations, ours is a world first and it will lead to new products, new services, new lenders and many new

opportunities, and - now the Minister for Treasury and Resources is here - new income for the Treasury, which is going to, I am sure, help. Virtual currencies can be significant building blocks of a modern digital economy. The introduction of an appropriate and proportionate regulatory regime that works, that is safe, is intended to encourage confidence and innovation while maintaining ours to high standards. These Regulations demonstrate a piece of really innovative legislation combining our experience in the area of financial services with innovation and technology. It is the example of melding finance and digital. I would like to conclude by saying that this is a real important milestone in the development of Jersey's digital and FinTech journey and to note that, as the person with responsibility for financial services in digital, I look forward to working and continuing with further such legislation. I therefore would like to propose the principles of the proposition.

The Bailiff:

Proposing the Appointed Day Act, I think. Seconded? **[Seconded]** Does any Member wish to speak? All those in favour of adopting ... the appel is called for. I invite Members to return to their seats. The vote is on whether to make the Appointed Day Act in relation to the Draft Proceeds of Crime (Miscellaneous Amendments) (Jersey) Regulations 2016 and I ask the Greffier to open the voting.

POUR: 44		**CONTRE: 0**		**ABSTAIN: 1**
Senator P.F. Routier				Senator S.C. Ferguson
Senator P.F.C. Ozouf				
Senator A.J.H. Maclean				
Senator I.J. Gorst				
Senator L.J. Farnham				
Senator P.M. Bailhache				
Senator A.K.F. Green				
Connétable of St. Helier				
Connétable of St. Clement				
Connétable of St. Peter				
Connétable of St. Lawrence				
Connétable of St. Mary				
Connétable of St. Ouen				
Connétable of St. Brelade				
Connétable of St. Martin				
Connétable of St. Saviour				
Connétable of Grouville				
Connétable of St. John				
Connétable of Trinity				
Deputy J.A. Martin (H)				
Deputy of Grouville				
Deputy J.A. Hilton (H)				
Deputy J.A.N. Le Fondré (L)				
Deputy of Trinity				
Deputy K.C. Lewis (S)				
Deputy M. Tadier (B)				
Deputy E.J. Noel (L)				
Deputy of St. John				
Deputy S.J. Pinel (C)				
Deputy R.G. Bryans (H)				
Deputy of St. Peter				
Deputy R.J. Rondel (H)				

Deputy S.Y. Mézec (H)				
Deputy A.D. Lewis (H)				
Deputy of St. Ouen				
Deputy L.M.C. Doublet (S)				
Deputy R. Labey (H)				
Deputy S.M. Wickenden (H)				
Deputy S.M. Bree (C)				
Deputy M.J. Norton (B)				
Deputy T.A. McDonald (S)				
Deputy of St. Mary				
Deputy G.J. Truscott (B)				
Deputy P.D. McLinton (S)				

Senator P.F.C. Ozouf:

I think I can get away with doing this *en bloc*.

The Bailiff:

We have just adopted the Act.

Senator P.F.C. Ozouf:

My note is incorrect, I apologise. All done then, Sir. Thank you very much.

ARRANGEMENT OF PUBLIC BUSINESS FOR FUTURE MEETINGS

4. Connétable L. Norman of St. Clement (Chairman, Privileges and Procedures Committee)

The proposition for future business is as per the Supplementary Order Paper with the addition of the 2 amendments to the Medium Term Financial Plan, which were lodged yesterday. The important thing to mention to Members is that we start the next meeting on Monday, 26th September at 2.30 to take questions and any statements. Otherwise the business is as per the Order Paper. I would say that the next meeting with the Medium Term Financial Plan is likely to take the full 3 days, in other words, Tuesday, Wednesday and Thursday. Has the potential to go on longer but hopefully not. So if it does we will have to consider meeting the following week because I think there are 13 amendments, depends how many are accepted and how long people debate it. But certainly the 3 days, I would suggest, would be appropriate to make sure that we reserve.

Deputy K.L. Moore of St. Peter:

Just before you speak, Sir, I just wanted to remind Members that there is a briefing in the Members Room downstairs today during lunch. Sandwiches will be provided but C.C.A. (Community and Constitutional Affairs) are going to be explaining their approach to the M.T.F.P. (Medium Term Financial Plan) and public sector reform. I would be grateful if Members would attend.

[12:30]

The Bailiff:

Over here your words were not quite heard. So perhaps you could repeat them, Minister, please.

The Deputy of St. Peter:

With pleasure, Sir. There is a C.C.A. briefing in the Members Room downstairs this lunch, and I hope that Members will attend to hear about our approach to the M.T.F.P. and public sector reform.

The Bailiff:

With sandwiches, Minister? **[Laughter]**

COMMUNICATIONS BY THE PRESIDING OFFICER

5. Mr. J. Oeillet, Usher - retirement

The Bailiff:

One of our Ushers, John Oeillet is due to retire on Friday. He is sitting here in the Chamber. He is well known to us all. He joined the States and the court as an usher in March 2000, so he has been helping us for approximately 16 years, slightly more than that, after some years in the private sector. He certainly has been very useful in the court as well. He has acted as a mini bus driver when the court went up to d'Hautree in 2001, and indeed the Greffier of the States found him very useful to pass contracts on a Friday afternoon for that purpose. I would like to take the opportunity publicly of thanking him for his help. He has a lightness of touch which diffuses difficulties wherever he goes. He is routinely polite and cheerful and has an engaging, perhaps even impish, sense of humour **[Laughter]** which all of us have suffered from from time to time. I am sure I speak for all Members in saying we will miss him in this Chamber and we wish him and his wife a long and healthy retirement. **[Approbation]** You have still got to pick up the Mace. **[Laughter]** The States now stand adjourned until 2.30 p.m. on 26th September.

ADJOURNMENT

[12.31]