

CAPACITY

Consultation on the Capacity Bill

**Background**

In the Autumn of last year the Department of Health and Social Care (“the Department”) ran an 8 week public consultation, the purpose of which was to seek views and, where relevant, evidence to support those views on the policies that would shape the Island’s new capacity laws.

A total of 154 responses were received. Overall, there was strong support of the need for a modern and clear legal framework for people who may have lost the capacity to make decisions for themselves, and a general consensus as to what the overarching capacity principles should, in the new Capacity Act, be.

Having carefully considered and analysed the responses that were received, the Department on 28 January 2021 published on the Government’s Consultation webpage the “Summary of Consultation Responses on Capacity Policy Principles”.

A copy of that Summary of Responses can be accessed via this link:

<https://consult.gov.im/health-and-social-care/capacity-bill-2021-principles/>

As outlined in the Summary of Responses, the next step for the Department was to draft a Capacity Bill taking into consideration the views that had been received. The Department has done so and now wishes to consult on the Capacity Bill itself.

**Overview**

This consultation paper is issued by the Department for the purpose of inviting interested parties to consider and comment on the proposed content of a draft Capacity Bill 2021, a Bill designed to create a modern and clear legal framework which safeguards the rights, dignity and wellbeing of people who may have lost the capacity to make decisions for themselves.

There are a number of questions throughout this consultation paper. They are there to guide you when responding and should not be taken to be prescriptive or restrictive; you are free to raise any points or make any comments that you believe to be relevant.

This consultation paper seeks views from everyone. We anticipate an interest from health and care practitioners, private sector organisations, voluntary and community sector organisations that provide services to people who may lack the capacity to make decisions as well as families who may also be impacted.

If you have any queries about this consultation or wish to request a paper copy of the consultation (including larger print) please contact: Georgina Jones, Department of Health and Social Care, Crookall House, Demesne Road, Douglas, IM1 3QA (georgina.jones@gov.im or 685167).

Please note the print size of this consultation on line can be increased by up to 200% for ease of reading or simply use your own screen settings to zoom in to increase the text.

**Proposal**

The Capacity Bill and the accompanying Code of Practice (which the Department will, in due course, be consulting on) is the first stage in the development of the Island’s Capacity laws, seeking to reform and put on a statutory footing, the following:

1. the over-arching principles of capacity, starting with the presumption that a person has capacity;
2. defining what we mean by “a person who lacks capacity”;
3. the test for establishing whether a person is unable to make a decision about a matter;
4. what must and must not be considered for the purposes of determining what is in a person’s best interests;
5. the creation of lasting powers of attorney, to replace the existing enduring powers of attorney;
6. court appointments to act on behalf of person’s who have lost the capacity to make decisions;
7. the ability for people to make decisions in advance about what medical and healthcare they wish to refuse in the future, in case they lose the capacity to make those decisions (advance decisions);
8. decisions of a very personal nature that cannot be taken on behalf of another person (excluded decisions);
9. the ill-treatment or neglect of a person lacking capacity; and
10. research on, or in relation to, a person who lacks capacity.

The Code of Practice will provide guidance to those who act or make decisions on another person’s behalf and, more generally, people working with or caring for those that cannot make decisions for themselves.

The second stage, which the Department will be commencing in May of this year, will be to update the Island’s capacity laws to:

1. put in place safeguards for people who may be deprived of their liberty in different settings by virtue of the type of care or treatment they receive, or the level of restrictive practises that they are subject to but, because they lack the mental capacity to do so, cannot consent (liberty protection safeguards); and
2. to put, on a statutory footing, independent capacity representatives to help and represent vulnerable people who lack the capacity to make important decisions and, who have no family or friends that it would be appropriate to consult, no donee appointed under a lasting power of attorney or a court appointed delegate.

The development of a statutory framework for liberty protection safeguards and the creation, in statute, of the role of independent capacity representatives will form a part of a wider review of the Department’s mental health legislation, specifically the interface with the Mental Health Act 1998 and the Code of Practice sitting underneath it.

**Summary of the provision of the Bill**

**Part 1 – Introductory**

Clause 1 simply confirms that the title of the Act will be the “Capacity Act 2020”. Clause 2 confirms that the Bill will come into operation on a day(s) to be decided by the Department.

**Part 2: Division 1 – The Principles**

Part 2: Division 1 of the Bill sets out:

1. the underlying principles of capacity (clause 3);
2. what in broad terms is meant by “a person lacks capacity” (clause 4);
3. the reasons why a person may be categorised as unable to make a decision (clause 5);
4. a key principle of the Bill that all steps and decisions taken for someone who lacks capacity must be taken in the person’s best interests (clause 6);
5. acts in connection with the care or treatment of another person (clauses 7 – 9 and 10) and;
6. the supply, and the price to be paid, of necessary goods and services to persons lacking the capacity to contract for the supply (clause 11)

**Clause 3 – the Principles**

Clause 3 proposes the key principles that will apply to decisions and actions taken under the Bill (if brought in to force). The starting point is a presumption of capacity – i.e. a person must be assumed to have capacity until it is proven otherwise.

Significantly, the principals place emphasis on the need to support people to exercise their capacity to make decisions where they can. If, on the other hand, it is established that a person lacks capacity (in accordance with the parameters set for inclusion under the Bill) to make a specific decision at a particular time, the provisions proposed provide alternative decision making mechanisms. These principals are substantively reflective of those presented under section 1 of the Mental Capacity Act 2005 (An Act of Parliament).

**Clause 4 – People who lack capacity**

This sets out the proposed definition of a person who lacks capacity for inclusion under the Bill.

The inability to make a decision must be caused by an impairment of or disturbance in the functioning of the mind or brain. This could cover a range of problems, such as psychiatric illness, learning disability, dementia or brain damage, as long as it has the necessary effect on the functioning of the mind or brain, causing the person to be unable to make the decision.

Clause 4 also makes it clear and focuses on the particular time when a decision has to be made and on the particular matter to which the decision relates, not on any theoretical ability to make decisions generally.

It follows that a person can lack capacity for the purposes herein even if the loss of capacity is partial or temporary or if his / her capacity fluctuates. It also follows that a person may lack capacity in relation to one matter but not in relation to another matter.

**Clause 5 – Inability to make decisions**

Clause 5 sets out the proposed test for assessing whether a person is unable to make a decision about a matter and therefore lacks capacity in relation to that matter. It is a “functional” test, looking at the decision-making process itself.

The key points are:

1. Clause 5 provides four reasons why a person may be categorised as unable to make a decision, being an inability to (a) understand the information relevant to the decision, (b) retain information for an appropriate period (subsection (3) then provides what an appropriate period of time is), (c) to use or weigh that information as part of the decision making process, (d) communicate their decision;
2. A determination of incapacity cannot be made if the relevant information has not been presented in a way appropriate to the person’s circumstances;
3. That a person can only retain information for a short period of time does not mean they are incapable of making a decision.

**Clause 6 – Best interests**

Clause 6 introduces a statutory best interest test for actions and decisions. The best interest principle is an essential aspect of the Capacity Bill and builds on the common law while offering further guidance.

Key to the best interest principle is for the decision maker, as far as it is possible, to permit and encourage the person lacking capacity to participate as fully as possible in the decision being made.

Clause 6 goes on to list particular steps that must be taken. The decision-maker must consider whether the individual concerned is likely to have capacity at some future date. This is in case the decision can be put off, until the person can make it himself. Even if the decision cannot be put off, the decision is likely to be influenced by whether the person will always lack capacity or is likely to regain capacity.

**Clauses 7 – 11**

Clause 7 proposes that within the Bill statutory protection against liability be included for certain acts done in connection with the care or treatment of another person, where that act is done in the best interests of a person whom the party providing the care or treatment reasonably believes to lack capacity; so long as the act is not negligent nor contrary to any advance decision to refuse treatment. Clauses 8 and 9 then set limitations.

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| Question:  Do you have any comments on the overarching principles and the preliminary clauses of the Bill? |

**Part 2: Division 2 – Lasting powers of attorney**

**General**

Clauses 12 to 20 and Schedule 1 of the Bill propose a new statutory form of power of attorney, a Lasting Power of Attorney (LPA). The Department is proposing that LPA’s will replace the Enduring Power of Attorney (EPA) provided for by the Powers of Attorney Act 1987 but, importantly the legal effect of an EPA already made under the current law would be preserved through due provision integrated within the Bill.

Unlike an EPA, a LPA can extend to personal welfare matters as well as to property and affairs. By making an LPA, an individual (the donor) confers on another individual or individuals (donee(s)) authority to make decisions about the donor’s personal welfare and/or property and affairs or specified matters concerning those areas.

**Clause 12** **– lasting powers of attorney**

Clause 12 specifies that an LPA may deal with personal welfare matters, property and affairs matters and also makes it clear that to be valid, an LPA must include authority to make decisions when the donor no longer has the capacity to do so.

Subsections (2) and (3) specify the requirements that must be met for the creation of an LPA. Subsection (4) reiterates that a donee must apply the principles set out in clause 1 and act in the donor’s best interests. A donee’s authority is also subject to any conditions or restrictions that the donor may choose to put in the LPA document itself.

**Clause 13 – appointment of donees**

Clause 13 sets out to impose certain requirements on donees in respect of how they must act. A donee must be aged 18 or over. Someone who is bankrupt cannot be appointed as the donee of an LPA relating to property and affairs. If the LPA relates only to property and affairs the donee can be either an individual, or a trust corporation. If the LPA relates to health and welfare the donee cannot be a trust corporation.

Clause 13 also provides the Department with a regulation making power to further specify who can and cannot act as a donee.

**Clause 14 – lasting powers of attorney: restrictions**

This clause sets out proposed restrictions to be placed on the powers of a donee under the Capacity Bill.

Subsections (1) – (4) provides that restraint can only be used by a donee if the following 3 conditions are satisfied:

1. the person lacks, or the donee reasonably believes that the person lacks, capacity in relation to the matter in question;
2. the donee reasonably believes it is necessary to do the act to prevent harm to the person; and
3. the act of restraint is a proportionate response to the likelihood of the person suffering harm and the seriousness of that harm.

Subsection (6) specifies restrictions in respect of LPA’s concerning personal welfare; for example it does not extend to making decisions other than those where the person lacks, or the donee reasonably believes that the person lacks, capacity.

**Clause 15 – scope of lasting powers of attorney: gifts**

This clause operates as a specific restriction in relation to gifts. It allows modest gifts proportionate to the donor’s assets to people related or connected to the donor (including himself/herself) on “customary occasions”, as defined; and to charities (subject to any conditions or restrictions in the LPA itself).

It is proposed that the court shall have the power under the Capacity Bill to authorise more substantial gifts if satisfied this would be in the donor’s best interests.

**Clause 16 – revocation of lasting powers of attorney**

This clause deals with the ways in which it is proposed LPA’s may cease to be effective, whether before or after it has been registered.

**Clause 17 – protection of donee and others if no power created or power revoked**

This clause sets out the proposed legal consequences for inclusion within the Capacity Bill when a registered LPA turns out to be invalid.

The provisions are substantively reflective of those afforded in relation to EPA’s under section 9 of the Powers of Attorney Act 1987.

Broadly, both donee’s and third parties are given protection from liability if they were unaware that the LPA was invalid or had come to an end.

**Clause 18 – powers of court in relation to validity of lasting powers of attorney**

This clause deals with the powers of the court in relation to the validity and revocation of lasting powers of attorney.

**Clause 19 – powers of court in relation to operation of lasting powers of attorney**

Clause 19 deals with the powers of the Court in relation to the operation of lasting powers of attorney.

**Clause 20 – Register of lasting powers of attorney**

Clause 20 confers the function of establishing and maintaining a register of lasting powers of attorney on the Registrar General.

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| Question  Do you have any comments on the proposed new statutory form of power of attorney? |

**Part 2: Division 3 – General powers of the Court and appointment of delegates**

**Overview: General Powers of Court and Delegates**

Clauses 21 – 27 and Schedule 2 (property and affairs: supplementary provisions) address the matter of the proposed general powers of the court under the Bill and in respect of the appointment of delegates.

There will be situations in which a person loses capacity to make a decision for themselves and has not appointed a donee to make a decision for them, whether about their care and treatment or property and affairs. Under this Part of the Bill it is proposed, in such circumstances, that the court may make decisions about personal welfare or property and affairs for persons lacking capacity, or appoint a delegate to do so. The role of a delegate is proposed to replace the role of a court appointed receiver under s.103 of the Mental Health Act 1998.

**Clause 21 – power to make declarations**

Clause 21 confers a general declaration making power on the Courts with regards to whether an individual has capacity or not, either in relation to a specific decision that needs to be made, or in relation to decisions on such matters as are described in the declaration.

Further, subsection (1)(c) would give the Courts the power to make a declaration on whether an act, or proposed act, under this Bill was or would be lawful.

**Clause 22 – power to make decisions and appoint delegates: general**

This clause sets out the core jurisdictions of the Courts in respect of individuals who lack capacity in matters relating to their personal welfare, property or affairs.

Essentially, subsection (2) provides the Courts with the power to do two things:

1. by Court Order, make a decision on behalf of a person lacking capacity in relation to their personal welfare, property or affairs;
2. appoint a person (known as a delegate) to act on behalf of a person lacking capacity in relation to their personal welfare, property or affairs.

Subsection (3) confirms that the Courts powers under this clause are subject to the overarching principles in clause 3 and the best interests requirements under clause 6 under the Capacity Bill (if brought in to force).

**Clause 23 – section 22 powers: personal welfare**

The powers proposed under clause 22 (above) in relation to making orders and appointing delegates will extend to a wide range of personal welfare issues.

This clause sets forth a proposed non-exhaustive, indicative list of matters which may be dealt with by the courts under clause 22 powers, for inclusion within the Capacity Bill. (Note: there are restrictions on what may be delegated to a delegate, set out below in clause 26.)

**Clause 24 – section 22 powers: property and affairs**

In much the same way as clause 23 (above) provides a list of personal welfare matters which may be dealt with by the Courts, clause 24 provides a similar list, but in respect of property and affairs.

Examples of property and affairs matters listed include the control and management of property and the acquisition of property.

**Clause 25 – appointment of delegates**

Clause 25 deals with the appointment of delegates.

Subsection (1) provides that a delegate must be at least 18 years of age. A trust corporation may also be appointed as a delegate but only act in respect of property and affairs.

Subsection (2) provides the Courts with the ability to appoint the holder of a specified office as delegate.

Subsection (3) confirms that the delegate must consent to the appointment.

Subsection (4) gives the Courts the power to appoint two or more delegates to act.

Subsection (8) allows the Court to confer on a delegate, the following powers:

1. to take possession or control of specified parts of the person’s property; and

1. to exercise all or any specified powers in respect of that property, including being able to invest.

**Clause 26 – restrictions on delegates**

Clause 26 sets a number of proposed limitations on the powers of delegates.

Importantly, subsection (1) specifies that a delegate cannot act where the person concerned is able to act for himself/herself. This is particularly relevant where the person may have fluctuating capacity; it would not be acceptable for a delegate to carry on making substitute decisions when the person concerned had in fact recovered. Subsection (6) also reiterates that a delegate must act in accordance with clause 3 (principles) and clause 6 (best interests).

**Clause 27 – Register of Delegates**

Clause 27 works to ensure that a register of delegates exists and confers the function of establishing and maintaining that register on the Registrar General.

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| Question  Do you have any comments upon the proposed powers of the Court or delegates appointed by the Court? |

**PART 2: DIVISION 4 – the Attorney General**

Clauses 28 to 32 deal with matters under the Bill pertaining to the Attorney, specifically:

1. clause 28 sets out what the functions of the Attorney General will be under the Bill;
2. clauses 29 and 30 confer a general power on the Attorney General to institute enquiries (restricted to the matters set out in clause 28) and obtain evidence for the purposes of such inquiries;
3. clause 31 gives the Attorney General a power to examine and take copies of specified records to enable him/her to effectively exercise his/her functions under the Bill; and
4. clause 32 provides the Department with a regulation making power in connection with the functions of the Attorney General specified under clause 28.

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| Question:  Do you have any comments on the proposed functions of the Attorney General under the Bill? |

**Part 2: Division 5: Advance Decisions to Refuse Treatment**

**Overview: Advance Decisions to Refuse Treatment**

An advance decision to refuse treatment is a clear instruction refusing a medical procedure or intervention at a time when they may lack the capacity at the time to consent to the carrying out or continuation of the treatment.

An advance decision can only be made by a person who is at least 16 years of age with mental capacity to do so.

**Clause 33 – advance decisions to refuse treatment: general**

Clause 33 introduces advance decisions to refuse treatment, specifically:

1. setting out when an advance decision may be made;
2. making it clear that an advance decision need not be in technical language;
3. spelling out the formalities for an advance decision; and
4. providing for the withdrawal and alteration of an advance decision, including the formalities required to do so.

**Clause 34 – validity and applicability of advance decisions**

Clause 34, importantly, sets out the circumstances in which an advance decision to refuse treatment will no longer be valid.

To be valid the advance decision must not have been withdrawn by the person to whom the advance decision applies, or overridden by a subsequent LPA giving a donee the authority to consent or refuse consent to the treatment (other LPAs will not override).

Also, if the person to whom the advance decision applies has acted in a way that is clearly inconsistent with the advance decision then it becomes invalid.

An advance decision will not be applicable if the person actually has capacity to make the decision when the treatment concerned is proposed. It will also not be applicable to treatments, or in circumstances, not specified in the decision. Furthermore the decision will not be applicable if there are reasonable grounds for believing that the current circumstances were not anticipated by the person and, if they had been anticipated by him/her, would have affected his/her decision

**Clause 35 – effect of advance decisions**

This clause sets out the proposed legal effect of a qualifying advance decision under the Capacity Bill (if brought in to force).

If an advance decision is both valid and applicable it shall have the same effect as a refusal of treatment by a person with capacity. That is, the treatment cannot lawfully be given. If given, the person refusing would be able to claim damages for the tort of battery and the treatment-provider might face criminal liability for assault. Subsections (2) and (3) clarify the rules about liability.

A treatment-provider may safely treat unless satisfied that there is a valid and applicable qualifying advance refusal; and a treatment-provider may safely withhold or withdraw treatment as long as he/she has reasonable grounds for believing that there is a valid and applicable qualifying advance decision.

If there is doubt or a dispute about the existence, validity or applicability of an advance decision then the court can determine the issue. Where a doubt or dispute about whether a particular refusal is in fact one which meets all the tests (existence, validity and applicability), action may be taken to prevent the death of the person concerned, or a serious deterioration in his / her condition, whilst any such doubt or dispute is referred to the court.

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| Question  Do you have any comments on the proposed provisions regarding advance decisions to refuse treatment? |

**Part 2: Division 6 – Supplemental**

Division 6 deals with matters that supplement the earlier provisions of Part 2 of the Bill; of note it covers excluded decisions, research and the offences of ill-treatment and neglect.

**Clauses 39 – 41 – Excluded Decisions**

Clause 39 lists specific decisions that can never be made under the Capacity Bill (if brought in to force) on behalf of a person who lacks capacity. Many of these decisions are of such a personal nature, that it would be inappropriate for a person other than the person directly involved to make it. Such decisions include consenting to a marriage or consenting to a civil partnership.

Clause 40 ensures that the legislation proposed under the Capacity Bill (if brought in to force) does not apply to any treatment for mental disorder which is subject to the rules about compulsory treatment set out in Part 4 of the Mental Health 1998 Act. The specific statutory safeguards which the 1998 Act gives in respect of compulsory psychiatric treatment must be afforded to those patients to whom that Act applies.

Clause 41 provides that the proposed legislation under the Capacity Bill does not apply to decisions on voting.

**Clause 42 – Research**

Clause 42 makes it clear on the face of the Bill that any intrusive research carried out on, or in relation to, a person who lacks capacity to consent may only be carried out as provided for in this clause.

A key principle is that, as per subsection (2), the interests of the person who lacks the capacity to consent must, at all times, be assumed to outweigh those of science and society.

**Clause 43 – Ill-treatment or neglect**

This clause proposes the creation of an offence of ill-treatment or wilful neglect of a person lacking capacity by anyone responsible for that person’s care, donees of LPAs or EPAs, or delegates appointed by the court.

Under current Manx Law similar offences are created under the provisions set under section 152 of the Regulation of Care Act 2013 (Ill-treatment or neglect offence), and section 123 of the Mental Health Act 1998 (Ill treatment) in respect of specified parties cited under the aforementioned sections.

The provisions put forward under this clause are however, as noted above, proposed to apply to everyone who looks after or cares for someone who lacks mental capacity. This includes both those who have the day-to-day care of that person as well as those who only have very short term care responsibilities, whether they are family carers or professional carers.

The proposals under this section do not define 'ill-treatment' and 'wilful neglect'; these concepts will be given their ordinary meaning.

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| Question  Do you have any comments on the proposed provisions of the Capacity Bill regarding excluded decisions, research and the offences of ill-treatment and neglect? |

**Part 2: Division 7 – Codes of Practice**

**Clause 44** deals with Codes of Practice

Subsection (1) provides for DHSC to make and revise a code or codes of practice to supplement the Act. This subsection specifies the persons to whom and the purposes in respect of which such guidance is to be issued.

Subsection (2) allows for the revision of Codes.

Subsection (3) allows the preparation of Codes to be delegated.

Subsection (4) specifies who is to have regard to a Code.

Subsection (5) provides that any codes of practice issued may be used as evidence in court or tribunal proceedings.

**Clause 45** deals with procedure in relation to Codes of Practice

Subsection (1) deals with prior consultation.

Subsection (2) requires a code to be laid before Tynwald.

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| Question  Do you have any comments regarding the provisions proposed regarding the Code of Practice? |