

STATES OF JERSEY



DRAFT CAPACITY AND SELF- DETERMINATION (CAPACITY AND LIBERTY – ASSESSORS) (JERSEY) REGULATIONS 201-

**Lodged au Greffe on 27th February 2018
by the Minister for Health and Social Services**

STATES GREFFE



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REPORT

Background

The Capacity and Self-Determination (Jersey) Law 2016 (the “2016 Law”) was approved by the States Assembly on 14th September 2016 and is proposed to be commenced later this year, alongside the Mental Health (Jersey) Law 2016, together with a series of secondary legislation supporting the implementation of those Laws. The background and objectives to the 2016 Law can be understood from the Report to the proposition for that Law ([P.79/2016](#)).

Part 5 of the 2016 Law establishes the basis upon which a significant restriction on liberty of a person, aged 16 and over, who lacks capacity to consent to the arrangements made for their care or treatment because they have an impairment or disturbance in the functioning of the mind or brain can be made lawful through authorisation. Even when such restrictions are necessary to protect a person from harm, the basis for depriving someone of their liberty must be authorised. The 2016 Law also provides the necessary framework for identifying significant restrictions that amount to a deprivation of liberty.

These Regulations support the procedures for ensuring that human rights are upheld and safeguarded. There was significant research and policy analysis involved in the development of Part 5 of the 2016 Law with local and UK-based subject-matter experts engaged in developing procedures and materials associated with the various assessments required under Part 5.

The Regulations

These Regulations make provision for arrangements relating to the appointment of Capacity and Liberty Assessors (“CLA”) under Part 5 of the 2016 Law to authorise significant restrictions on the liberty of any person residing in a relevant place, as defined by the 2016 Law.

Criteria for appointment and conflict of interest

The Regulations provide the criteria for the appointment of Capacity and Liberty Assessors by the Minister. There are important considerations for the Minister in the selection of CLA to ensure that they do not have a vested interest in the assessment outcome. Such interests may include whether the CLA is a relative or has a financial interest in the particular matter. Conflicts are not limited to relatives and carers. The Regulations also provide guidance for professionals where there is a conflict of

interest. This robust approach will ensure that assessments, which are authorising human rights infringements, are independent and beyond reproach.

Form of CLA reports

The assessments must be of a standard that will withstand scrutiny following established legal principles. The Regulations ensure that the Minister is able to set out how and in what manner the assessment is recorded to meet this requirement. To adhere to established legal principles the assessment structure will address the following key areas –

Age: the person must be aged 16 or older.

Mental Health: this is undertaken by a medical professional to establish whether an impairment or disturbance of mind or brain is present.

Eligibility: this is to establish whether the person is being or instead should be treated under the Mental Health (Jersey) Law 2016.

Capacity: this is to establish whether a person lacks the ability to make the decision about the treatment or care in the place that is applying for the authorisation.

No Refusals: this is to establish whether there are any authoritative decision-makers whose views might conflict with the authorisation of significant restriction, such as an attorney or delegate for health and welfare.

Best Interests: this is to ensure what is being proposed is in the person's best interests as defined in Article 6 of the 2016 Law.

Additional powers required for CLA

To carry out such important but sensitive assessment, the Regulations give CLA powers to access and gather information about a person. They also extend the range of persons the CLA can consult, in addition to those specified in the 2016 Law. This will give a fuller picture of the person's likely choices for themselves, by considering their known values, wishes and feelings in relation to the matter. This is an essential element to ensure the assessment adheres to the principle of best interests in the 2016 Law.

Financial and manpower implications

The cost to health and social services for implementing these Regulations has been included in the overall funding within HSSD P82 and through the 2016 – 2019 MTFP, which covers the implementation of the new Capacity and Self-Determination (Jersey) Law 2016. The indicative requirements to maintain the 2016 Law from 2020 and beyond have been identified by HSSD, and are included as indicative requirements for growth funding within the next MTFP process. There are no additional financial or staffing implications arising from the adoption of these draft Regulations.

Collective responsibility under Standing Order 21(3A)

The Council of Ministers has a single policy position on this proposition, and as such, all Ministers, and the Assistant Ministers for Health and Social Services, are bound by the principle of collective responsibility to support the proposition, as outlined in the Code of Conduct and Practice for Ministers and Assistant Ministers ([R.11/2015](#) refers).

Explanatory Note

These Regulations would make provision for arrangements relating to the appointment of persons, under Article 41 of the Capacity and Self-Determination (Jersey) Law 2016, to act as assessors in cases where it is proposed, under Part 5 of that Law, to impose significant restrictions on the liberty of any person (“P”) residing in a relevant place as defined by Article 37(3) of the Law.

Regulation 1 is the interpretation provision. *Regulation 2* would prohibit the Minister from appointing, as an assessor in relation to a particular P, a person who is a relative (as defined by *Regulation 2(2)*) of P or a relative of a person who has a financial interest in P’s care, or who has a financial interest in P’s care or is involved in P’s care or treatment or decisions about P’s care or treatment. By *Regulation 2(4)* the Minister would also be obliged, in appointing an assessor, to ensure that the assessor is a suitable person having regard to P’s ethnic or cultural identity or particular disability.

Regulation 3 would require any person appointed as an assessor who is or becomes aware of a conflict of interest to report the fact or matter giving rise to such a conflict to the Minister, and would provide that if the Minister considers that another person should be appointed as assessor, the Minister must inform the first assessor and appoint another person accordingly.

Regulation 4 would confer power on assessors, for the purpose of carrying out assessments, to interview persons, and to inspect documents relevant to P’s care which may be held in a domestic setting. *Regulation 5* would provide that reports by assessors must be in the specified form.

Regulation 6 gives the title by which these Regulations may be cited and would provide for them to come into force immediately after commencement of Part 5 of the Law.



Jersey

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(JERSEY) REGULATIONS 201-**

Arrangement

Regulation

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Made [date to be inserted]
Coming into force [date to be inserted]

THE STATES, in pursuance of Articles 40(3), 44(8) and 69 of the Capacity and Self-Determination (Jersey) Law 2016¹, have made the following Regulations –

1 Interpretation

In these Regulations –

- (a) the “Law” means the Capacity and Self-Determination (Jersey) Law 2016²;
- (b) a reference to an “assessor” is to a registered person designated by the Minister, under Article 40 of the Law, for the purposes of carrying out assessments in accordance with Part 5 of the Law;
- (c) a reference to “P” is a reference to the person in respect of whom Part 5 of the Law applies so as to permit significant restrictions on that person’s liberty.

2 Assessors – criteria for appointment

- (1) The Minister shall not appoint a person to act as an assessor in relation to P, if that person –
 - (a) is a relative of P or a relative of a person who has a financial interest in the care of P;
 - (b) has a financial interest in the care of P; or
 - (c) is a person involved in carrying out P’s care or treatment or in making decisions about P’s care or treatment.
- (2) For the purposes of paragraph (1)(a), “relative” means, in relation to P –
 - (a) a spouse, former spouse, civil partner or former civil partner;
 - (b) a person living with P as though the person were P’s spouse or civil partner;

- (c) a parent or child;
- (d) a brother or sister;
- (e) a child of a person falling within sub-paragraphs (a), (b) or (d);
- (f) a grandparent or grandchild;
- (g) an uncle or aunt;
- (h) a first cousin; and
- (i) a person mentioned in sub-paragraph (c), (d), (e), (f) or (g) whose relationship is to the person mentioned in sub-paragraph (a) or (b),

and for these purposes a relationship of the half-blood shall be treated as a relationship of the whole blood and the stepchild or adopted child of a person as his or her child.

- (3) For the purposes of paragraph (1)(a) and (b), a person has a financial interest in a case where that person is a partner, director, other office-holder or major shareholder of a relevant place or of a person who is M in relation to that place, and “major shareholder” means –
- (a) where the owner of, or M in relation to, a relevant place is a company limited by shares, a person holding one tenth or more of the issued shares in that company; and
 - (b) in any other case, any owner of, or person who is M in relation to, the relevant place.
- (4) Where –
- (a) P is from a cultural or ethnic group forming a minority among the population of Jersey; or
 - (b) P has a physical or sensory impairment, learning disability or autistic spectrum disorder,

the Minister must ensure that, so far as practicable and as the Minister considers reasonable, there is appointed an assessor with appropriate understanding of P’s case and the ability to communicate appropriately with P.

3 Assessors – conflicts of interest

- (1) Where a person appointed as an assessor is aware, or becomes aware, of any fact or matter (including but not limited to such a fact or matter as described in Regulation 2(1)) that –
- (a) gives rise to a conflict of interest; or
 - (b) otherwise prevents, or may prevent, that person from acting in P’s best interests,

the assessor must immediately inform the Minister of that fact or matter.

- (2) On receiving information under paragraph (1) the Minister must consider, having regard to all the circumstances including in particular P’s best interests, whether the assessor may continue to act as such or whether another person should be appointed to act as assessor in P’s case.

- (3) The Minister must inform the assessor of his or her decision following consideration under paragraph (2), and, if the Minister so decides, must appoint another person to act as assessor in P's case.

4 Assessors' powers to interview persons, inspect records etc.

- (1) Without prejudice to the generality of the powers conferred by Article 44(4) of the Law, an assessor may, upon reasonable notice being given, interview or take representations from such persons, other than those listed in Article 44(5) of the Law, as the assessor may consider necessary or appropriate.
- (2) Without prejudice to the generality of powers conferred by Article 44(7)(a)(iii) of the Law, an assessor may, upon reasonable notice in writing being given to the holder of the document, inspect and take copies of any document which –
 - (a) the assessor considers relevant to the care and treatment of P; and
 - (b) is held by a person in any place (including but not limited to a relevant place) where P resides or has resided.
- (3) In exercising powers under this Regulation an assessor must have regard to any guidance, whether or not contained in a code of practice under Article 68 of the Law, which the Minister may issue as to the exercise of such powers.

5 Form of assessors' reports

A report of an assessment to be provided under Article 45 of the Law must be provided in the form specified for the purpose by the Minister.

6 Citation and commencement

These Regulations may be cited as the Capacity and Self-Determination (Capacity and Liberty – Assessors) (Jersey) Regulations 201- and shall come into force immediately following the commencement of Part 5 of the Law.

¹ *L.30/2016*
² *L.30/2016*