

STATES OF JERSEY



DRAFT CAPACITY AND SELF- DETERMINATION (INDEPENDENT CAPACITY ADVOCATES) (JERSEY) REGULATIONS 201-

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

STATES GREFFE



Jersey

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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 6 of the 2016 Law introduces the new statutory role of Independent Capacity Advocates (“ICA”). An ICA is a specially-trained professional who will work within the framework of the 2016 Law whilst appointed, and ICA will work to maximise the involvement of the person in decision-making. They will do this by participation in the ‘best interests’ process, bringing an additional perspective on the person’s likely wishes and feelings in relation to particular matters.

The Regulations

The Regulations provide for appointment of, and services to be provided by ICAs to represent persons and their rights under the 2016 Law.

Jersey Mencap and Mind Jersey provided input on a range of issues pertaining to ICAs and other matters during the consultation phase of the development of the 2016 Law. They were also consulted on the drafting of the proposed Regulations.

Appointment of ICA

The Regulations provide the Minister with powers to appoint suitably qualified ICAs or service providers who can provide statutory capacity advocacy services. The Regulations ensure that individuals carrying out this important role are trained professionals with integrity, as they contribute to safeguarding some of Jersey’s most vulnerable citizens.

Service provision by ICA

An ICA will only be appointed when a person, aged 16 years or older, lacks decision specific capacity and has no-one appropriate who can advocate on their behalf. The 2016 Law places this important safeguard in statute. ICA will be involved in supporting the following decisions –

- serious medical treatment
- decisions about significant changes in accommodation or residence.

An ICA can also be appointed under Part 5 of the 2016 Law, which deals with significant restriction on liberty. This involvement can occur when an authorisation has been sought, granted and or is subject to review for a person who has no other support.

Cessation and termination of ICA

The Regulations provide necessary detail regarding cessation of ICA services. This is of particular importance in safeguarding vulnerable people.

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 Mental Health (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 for the States 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 as to the appointment of, and services to be provided by, independent capacity advocates (“ICAs”) to represent patients and their rights under the Capacity and Self-Determination (Jersey) Law 2016 (the “Law”).

Regulation 1 is an interpretation provision. *Regulation 2* would require the Minister to make arrangements for appointment of ICAs, having regard to principles of diversity and being satisfied that the qualifications for appointment of an individual set out in *Regulation 3* are fulfilled. *Regulation 4* would set out the powers and functions exercisable by an ICA in carrying out his or her primary role of representing the best interests of a qualifying person (being a person lacking capacity in respect to a matter and requiring the help of an advocate, under Article 51 or Part 6 of the Law). *Regulation 5* would confer specific power on ICAs to challenge decisions made under the Law in relation to the qualifying person.

Under *Regulation 6*, the provision of services by an ICA would cease upon the occurrence of any of the events listed in *Regulation 7(2)*, including various grounds on which the ICA may become disqualified. By *Regulation 7*, the Minister (or the provider of services of an ICA) would be obliged to terminate the appointment of an ICA as such, if the individual ICA ceases to fulfil any of the conditions for appointment, and where a provider continued to provide services of such an ICA, the provider would be guilty of an offence and liable to a fine of level 3 on the standard scale (a maximum of £10,000 under the Criminal Justice (Standard Scale of Fines) (Jersey) Law 1993).

Regulation 8 would enable the Minister by Order to make provision relating to the payment of fees and reimbursement of expenses to ICAs. *Regulation 9* would make general provision permitting an individual to act as both an ICA and an independent mental health advocate under the Mental Health (Jersey) Law 2016.

Regulation 10 would give the title by which these Regulations may be cited and provide for them to come into force immediately following the commencement of Part 6 of the Law.



Jersey

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Arrangement

Regulation

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

THE STATES, in pursuance of Articles 62, 63 and 69 of the Capacity and Self-Determination (Jersey) Law 2016¹, have made the following Regulations –

1 Interpretation

- (1) In these Regulations –
 - “authorized person” means any person empowered or enabled, by Article 51, 64 or 65 of the Law, or by any subordinate provision under the Law, to instruct or nominate an ICA to represent any other person;
 - “ICA” means a person appointed to act as an advocate, within the meaning given by Article 61(2) of the Law;
 - “Law” means the Capacity and Self-Determination (Jersey) Law 2016²;
 - “Mental Health Law” means the Mental Health (Jersey) Law 2016³;
 - “provider” means a provider of advocacy services, being a person other than the Minister (including a voluntary organization) which employs or engages individuals to provide services as ICAs;
 - “qualifying person” means a person lacking capacity in respect to a matter and requiring the help of an ICA, under Article 51 or Part 6 of the Law.
- (2) A word or expression used in these Regulations which also occurs in the Mental Health Law shall have the same meaning for the purposes of these Regulations as the meaning given to it by the Mental Health Law.

2 Minister to appoint independent capacity advocates (“ICAs”)

- (1) The Minister must make arrangements for the appointment, either directly or by a provider, of individuals to act as ICAs.
- (2) No individual shall be appointed under paragraph (1) unless –

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- (a) in the case of an appointment by the Minister, the Minister is satisfied that the individual fulfils the conditions in Regulation 3; or
 - (b) in the case of an appointment by a provider –
 - (i) the arrangements made between the Minister and that provider include a requirement that the provider be satisfied, in making the appointment, that the individual fulfils the conditions in Regulation 3, and
 - (ii) the provider is so satisfied.
 - (3) The Minister may only make arrangements under this Regulation if he or she has had due regard to the diverse circumstances (including but not limited to the ethnic, cultural and demographic needs) of qualifying persons.
 - (4) In particular, and without prejudice to the generality of paragraph (3), in making arrangements under this Regulation the Minister must ensure that, so far as practicable and as the Minister considers reasonable, there are appointed ICAs with understanding of, and ability to communicate with, qualifying persons –
 - (a) who are from cultural or ethnic groups forming a minority among the population of Jersey; or
 - (b) who have physical or sensory impairments, learning disabilities or autistic spectrum disorders.

3 Conditions for appointment as ICA

- (1) The conditions mentioned in Regulation 2(2) are that the individual in question –
 - (a) has appropriate experience and training such as may be further specified in a code of practice issued by the Minister under Article 68 of the Law;
 - (b) is an individual of integrity and good character; and
 - (c) is able to act independently, including independently of any person who requests the individual to visit or interview a qualifying patient.
- (2) Evidence provided for the purpose of demonstrating fulfilment of the condition in paragraph (1)(b) must include, in respect of the individual in question, an enhanced criminal record certificate issued under section 113B of the Police Act 1997 of the United Kingdom as extended to Jersey, with modifications, by the Police Act 1997 (Criminal Records) (Jersey) Order 2010 (S.I. 1997/765 of the United Kingdom).
- (3) In the case of an appointment by a provider, the arrangements made between the Minister and that provider must include a requirement that such a certificate as described in paragraph (2) be provided.
- (4) The Minister may by Order prescribe such further terms and conditions as to the appointment of ICAs as the Minister may think fit.

4 Powers and functions of ICAs: general

- (1) Without prejudice to the generality of Part 6 of the Law, where an authorized person instructs or nominates an ICA to represent a qualifying person, the ICA must determine how best in all the circumstances to represent the qualifying person's interests.
- (2) In carrying out the general obligation in paragraph (1) and the functions in Article 63 of the Law, an ICA must, in particular –
 - (a) verify that his or her instructions are given by an authorized person;
 - (b) to the extent that it is practicable and appropriate to do so, interview the qualifying person (and where necessary, in private);
 - (c) to the extent that it is practicable and appropriate to do so, inspect the qualifying person's health records, including –
 - (i) any record made or held by the Minister or the Health and Social Services Department, and relevant to a decision which is to be made in respect of, or on behalf of, the qualifying person,
 - (ii) any record made or held by a person registered under the Health Care (Registration) (Jersey) Law 1995⁴ or the Nursing and Residential Homes (Jersey) Law 1994⁵, and relevant to the functions carried out by the ICA, and
 - (iii) any record made or held by a person (other than such a person as mentioned in clause (i) or (ii)) providing domiciliary care to P, and relevant to the functions carried out by the ICA;
 - (d) to the extent that it is practicable and appropriate to do so, consult any person who, to the ICA's knowledge or belief –
 - (i) provides, in a professional capacity, care or treatment to the qualifying person, or
 - (ii) is otherwise such a person as mentioned in Article 6(4) of the Law; and
 - (e) take all such other steps as are practicable and as the ICA considers necessary, to obtain information about the qualifying person and about the matter in relation to which the qualifying person lacks capacity.
- (3) Where the qualifying person is detained in an approved establishment, the managers of that establishment must, for the purposes of paragraph (2)(b), ensure that the ICA is able at all reasonable times to gain access to the qualifying person.
- (4) Following the exercise of any function under this Regulation or under Part 6 of the Law, the ICA must provide a report in writing to the authorized person who instructed or nominated the ICA.
- (5) An ICA must perform his or her functions under this Regulation and under Part 6 of the Law in a timely manner and in accordance with any further provisions made by way of a code of practice issued by the Minister under Article 68 of the Law and relating to such functions.

- (6) In paragraph (2)(c), “health records” means any records –
- (a) consisting of information relating to the physical or mental health or condition of an individual; and
 - (b) made by or on behalf of a person acting in a professional role in connection with the care or treatment of that individual.

5 Powers of ICAs to challenge decisions

Where –

- (a) an ICA has been instructed or nominated to represent a qualifying person in relation to any matter; and
- (b) a decision affecting the qualifying person (including a decision as to his or her capacity) is made under the Law in that matter,

the ICA shall have the same rights to challenge that decision as he or she would have if he or she were a person (other than an ICA) caring for the qualifying person or otherwise interested in the qualifying person’s welfare.

6 Cessation of services of ICA

- (1) The provision of services by any individual ICA to any particular qualifying person shall cease upon the occurrence of any of the events listed in paragraph (2).
- (2) The events mentioned in paragraph (1) are that –
 - (a) the qualifying person regains capacity to the extent that he or she no longer requires the services of the ICA;
 - (b) the qualifying person, or that person’s attorney or delegate, makes a request to the Minister or the provider (as the case may be) for the appointment of a different individual ICA, and the request is approved;
 - (c) the ICA is unable to provide such services because he or she –
 - (i) ceases to be domiciled in Jersey,
 - (ii) is under sentence of imprisonment,
 - (iii) is declared bankrupt,
 - (iv) lacks the capacity to provide such services, or
 - (v) is suspended from any appointment by the Minister or by a provider;
 - (d) the appointment of the ICA is terminated under Regulation 7;
 - (e) in the case of the provider in question being a registered charity within the meaning given to that term by the Charities (Jersey) Law 2014⁶ or an entity meeting the charity test under that Law, the provider ceases to be so registered or to meet that test;
 - (f) in the case of the provider in question being a company registered under the Companies (Jersey) Law 1991⁷, the provider ceases to be so registered.

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- (3) Where the services of the ICA were provided by the Minister, upon the occurrence of such an event as listed in paragraph (2)(c) or (d) the authorized person must take all such steps as are reasonable to ensure that the qualifying person (and with the consent of the qualifying person, his or her nearest person) is informed of –
- (a) the date when those services are to cease; and
 - (b) relevant details of the services which are to be provided in substitution for the services which have ceased,
- and must do so before the date mentioned in sub-paragraph (a) or as soon as reasonably practicable after that date.
- (4) Where the services of the ICA in question were provided to the qualifying person in question by a provider, upon the occurrence of such an event as listed in paragraph (2)(c), (d), (e) or (f) –
- (a) the provider must inform the Minister, as soon as reasonably practicable, of the occurrence of the event; and
 - (b) the authorized person must take all such steps as are reasonable to ensure that the qualifying person (and with the consent of the qualifying person, his or her nearest person, if any) is informed of –
 - (i) the date when those services are to cease, and
 - (ii) relevant details of the services which are to be provided in substitution for the services which have ceased,and must do so before the date mentioned in clause (i) or as soon as reasonably practicable after that date.
- (5) The authorized person must also give the same information as is required to be given under paragraph (3)(b) or (4)(b) –
- (a) in the case of a qualifying person who is liable to detention under the Mental Health Law, to the qualifying person's responsible medical officer; or
 - (b) in the case of a qualifying person who is subject to guardianship under the Mental Health Law, to the qualifying person's guardian.

7 Termination of appointment of ICA

- (1) Where an individual ceases to fulfil any of the conditions for appointment specified in Regulation 3 –
- (a) in the case of an individual appointed by the Minister, the Minister must terminate the appointment;
 - (b) in the case of an individual appointed by any provider, that provider must terminate the provision of services by that individual; and
 - (c) the individual must immediately cease to provide services as an ICA.
- (2) The Minister or the provider, as the case may be, must as soon as reasonably practicable give notice in writing of termination of an appointment under this Regulation, to –

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- (a) the individual in question;
 - (b) any qualifying persons to whom services were provided by the individual; and
 - (c) in relation to each such qualifying person, any nearest person (with the consent of the qualifying person), responsible medical officer, guardian or managers of an approved establishment, as the case may be,

and the Minister or provider must take all such steps as are reasonable, including but not limited to giving notice in writing, to ensure that any qualifying person and any other person mentioned in sub-paragraph (c) is informed of relevant details of services which are to be provided in substitution for the services which have ceased as a result of the termination of appointment.

- (3) A provider which continues, in breach of paragraph (1)(b), to provide services by an ICA whose appointment has been terminated, is guilty of an offence and liable to a fine of level 3 on the standard scale.
- (4) An individual whose appointment as an ICA has been terminated but who nevertheless –
 - (a) holds himself or herself out as providing the services of an ICA; or
 - (b) by his or her omission, allows another person to believe that he or she is capable of providing such services or entitled or authorized to provide such services,

is guilty of an offence and liable to a fine of level 3 on the standard scale.

8 Fees and expenses of ICAs

The Minister may by Order make provision regarding payment of fees to, and the reimbursement of expenses of, ICAs providing services under these Regulations (whether individually or by way of providers), including (but not limited to) provision as to the level of such fees, and different provision for different cases or types of case.

9 General

- (1) The appointment of ICAs under these Regulations is without prejudice to and shall not affect the appointment of an independent mental health advocate or any entitlement to the help or services of an independent mental health advocate under the Mental Health Law.
- (2) Notwithstanding paragraph (1), an individual may be appointed as an ICA and as an independent mental health advocate, whether generally or in relation to an individual qualifying patient.

10 Citation and commencement

These Regulations may be cited as the Capacity and Self-Determination (Independent Capacity Advocates) (Jersey) Regulations 201- and shall come into force immediately following the commencement of Part 6 of the Capacity and Self-Determination (Jersey) Law 2016⁸.

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- 1 *L.30/2016*
 - 2 *L.30/2016*
 - 3 *L.29/2016*
 - 4 *chapter 20.300*
 - 5 *chapter 20.725*
 - 6 *chapter 15.070*
 - 7 *chapter 13.125*
 - 8 *L.30/2016*