



Isle of Man Government

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CAPACITY BILL 2022

EXPLANATORY NOTES

These Notes have been produced for the assistance of Members with the approval of the Member in charge of the Bill, Mr Lawrie Hooper MHK, Minister for Health and Social Care.

INTRODUCTION

1. These explanatory notes relate to the Capacity Bill 2022 ("the Bill"). They have been prepared by the Department of Health and Social Care ("the Department") to assist readers of the Bill. They do not form a part of the Bill and they have not been endorsed by the House of Keys.
2. The notes should be read in conjunction with the Bill. They are not, and are not meant to be, a comprehensive description of the Bill.

BACKGROUND

3. Capacity issues potentially affect everyone. A person's capacity to make some decisions may be impaired for a variety of reasons, such as having significant learning difficulties or mental health problems, suffering a stroke or head injuries, or the onset of dementia.
4. It is essential that the provision of services for people who may have lost the capacity to make decisions for themselves are underpinned with a modern and clear legal framework which safeguards the individual's rights, dignity and wellbeing.

5. To achieve a framework that rests on clear and modern foundations of principle, the Bill:
 - a. sets out the overarching principles of mental capacity,
 - b. defines what is meant by "a person who lacks capacity",
 - c. prescribes the test for establishing whether a person is unable to make a decision,
 - d. specifies what is to be considered in determining what is in a person's best interests,
 - e. creates a new form of power of attorney: lasting power of attorney,
 - f. puts on a statutory footing advance decisions about future healthcare, in the event of a loss of capacity,
 - g. creates the criminal offences of the ill-treatment or wilful neglect of a person lacking capacity, and
 - h. regulates what and the manner in which research can be carried out on, or in relation to, a person who lacks the capacity to consent.
6. In the opinion of the Member moving the Bill, its provisions are compatible with the Convention rights within the meaning of the Human Rights Act 2001.

FINANCIAL EFFECTS OF THE BILL

7. An Impact Assessment of the Bill has been prepared by the Department; this is attached at Appendix 1.

CLAUSE BY CLAUSE NOTES

Clause 1 – short title

8. This clause gives the short title to the Act which will, if enacted, result from the Bill.

Clause 2 - commencement

9. This clause provides for the resulting Act to come into operation on such day or days as the Department may by order appoint.

Clause 3 – the principles

10. This clause opens Division 1 (principles and preliminary) of Part 2 (persons who lack capacity) setting out the overarching principles that are to apply to decisions and actions taken under the Bill, being:

- a) the starting point is that a person has capacity unless it is established otherwise;
- b) assumptions should not be made about a person's capacity based upon their age, appearance, condition or behaviour;
- c) all practicable steps must be taken to help a person make a decision;
- d) any act done under the Bill, on behalf of a person lacking capacity, must be done in the best interests of the person lacking capacity;
- e) when acting or making a decision on behalf of a person lacking capacity the least restrictive principle must always be considered.

Clause 4 – lack of capacity

11. For the purposes of the Act, this clause defines what 'a person who lacks capacity' means. The key points are:

- a) the cause of the inability to make a decision must be an impairment of, or a disturbance in the functioning of, the mind or brain (the 'diagnostic test');
- b) as to whether a person lacks capacity to make a decision is time and matter specific, i.e. at a particular point in time and in relation to a particular matter;

- c) given that it is time specific, it therefore follows that a person can be said to lack capacity even if the loss of capacity is temporary or fluctuates.

Clause 5 – inability to make decisions

- 12. This clause sets out the functional test for establishing whether a person is unable to make a decision for themselves about a matter.
- 13. The test looks at the decision-making process itself and four reasons are given why a person may be unable to make a decision.
- 14. Firstly, for a person to make a decision they must have the ability to understand the information that is relevant to the decision; secondly, to retain this information for long enough to make the decision; thirdly, to use or weigh up that information to arrive at the decision and fourthly to communicate their decision.
- 15. Subsections (2) to (4) are ancillary and add detail for the purposes of the four reasons described. Subsection (5) provides the Department with a regulation making power regarding the steps to be taken to assist a person to make a decision for themselves.

Clause 6 – Best interests

- 16. It is an overarching principle, under clause 3, that everything done, or any decisions made, under the Bill for a person who lacks capacity must be done in their best interests.
- 17. Subsection (2) makes it clear that best interest decision determinations must not be made on the basis of unjustified and prejudicial assumptions. Subsections (3) to (9) set out what the person making the determination must do or take into consideration.
- 18. Subsection (10) makes it clear that whilst all the factors mentioned in the section must be considered (so far as they are reasonably ascertainable) it is those factors mentioned in subsection (9) that carry more weight.
- 19. Subsection (11) applies to determinations as to whether treatment necessary to save life is in the best interests of the person concerned.

20. Subsection (11)(a) makes it clear that the decision-maker must not be motivated to bring about the person's death. Thus, regardless of what a decision-maker personally feels about, or would want for the person concerned, this must not affect their objective assessment of whether a treatment is in their best interests.
21. Paragraph (b) makes it clear that it does not mean that doctors are under an obligation to provide, or continue to provide, life-sustaining treatment where it is not considered to be in the best interests of the person.
22. Subsection (12) makes it clear to whom the duties imposed by this section apply.
23. Subsection (13) provides protection for those who act in the reasonable belief that they are doing so in the other person's best interests.

Clause 7 – meaning of "C" and "P": sections 8 to 10

24. This clause provides definitions for the purposes of clauses 8 to 10.

Clause 8 – acts in connection with care or treatment

25. Subsections (1) and (2) provide statutory protection against liability for certain acts done in connection with the care or treatment of a person who may lack capacity. Thus, if an act qualifies as a "section 8 act" then a carer will not face civil liability or criminal prosecution.
26. However subsection (3) makes it clear that this clause does not act so as to exclude a carer from civil liability or criminal liability if it's a result of their negligence. Subsection (4) clarifies that this section does not affect the operation of advance decisions to refuse treatment. Thus, if a person has made a valid and applicable advance decision then that takes precedence over the rules in this section.

Clause 9 – section 8: limitations

27. Clause 9(1) limits clause 8 so that where the act is intended to restrain (as defined in subsection (2)) a person lacking capacity two conditions must be met, being:

- a. there must be a reasonable belief that it is necessary to do the act to prevent harm to that person; and
- b. the act is a proportionate response to the likelihood of harm being suffered and the seriousness of that harm.

28. Subsection (3) sets out the second limitation; that a valid decision by a donee or a delegate takes priority over any action which might be taken under clause 8.

29. However, under subsection (4) the authority of a donee or delegate is limited. Where there is a dispute over a decision made by a donee or delegate that:

- a. prevents the provision of life sustaining treatment; or
- b. might cause a serious deterioration in condition,

this does not prevent a doctor taking action to sustain life or prevent serious deterioration whilst any such dispute is referred to the court.

Clause 10 - expenditure

30. This clause is to be read in conjunction with clause 8. If an act is done to which that clause applies which involves expenditure it is lawful for the carer to pledge credit, apply money that's in the possession of the person they are caring for or treating and pay themselves back from money in their possession (or consider themselves owed by that person).

31. Subsection (3) recognises that some people may have control over the money or property of the person that they're caring for by some other means (for example, banking arrangements).

Clause 11 – payment for necessary goods and services

32. Clause 11 of the Bill covers people who lack capacity to contract. If necessary goods or services are supplied to a person who lacks the capacity to contract for that supply they must pay a reasonable price for them.

33. Subsection (2) repeats the well-established legal definition of what is 'necessary' and subsection (3) makes it clear that 'services' extends to the provision of accommodation.

Clause 12 – lasting powers of attorney

34. This clause opens Division 2 (lasting powers of attorney) of Part 2 (persons who lack capacity). Subsection (1) makes it clear that the scope of a lasting power of attorney can extend to health and welfare matters and matters concerning property and financial affairs.

35. Subsection (2) deals with the creation of a lasting power of attorney. The donor must be aged 18 or over and have the capacity to execute the instrument. The rules as to whom a donee can be, specified in clause 13, must be complied with and the form of the instrument and its registration must be in accordance with Schedule 1.

36. Under subsection (3) if an instrument fails to comply with the requirements specified in this clause, clause 13 or Schedule 1 then the document created will not be valid and, as such, confers no authority on a donee to make decisions on behalf of the donor.

37. Subsection (4) makes it clear that a donee must apply the key principles set out in clause 3 and act in the best interests of the donor. A donee's authority is subject to the conditions and restrictions that the donor has specified in the instrument.

Clause 13 – appointment of donees

38. Clause 13 of the Bill restricts who can act as a donee.

39. For powers of attorney which relate to health and welfare the donee must be an individual who has reached the age of 18.

40. For powers of attorney which relate to property and affairs the donee must be an individual who is not bankrupt who has reached the age of 18 or a trust corporation.

41. Subsection (5) provides that where two or more persons are appointed to act as donee the instrument may appoint them to act either jointly, jointly and severally (which means

they can all act together or each of them can act independently) or jointly in respect of some matters and jointly and severally in respect of others.

42. To the extent that the instrument does not specify whether the donees are to act jointly or jointly and severally it is to be assumed that they are to act jointly (subsection (6)).
43. Where the instrument specifies that the donees are to act jointly, any breach of the relevant rules about how lasting powers of attorney are made will prevent a valid power being created (subsection (7)).
44. Where the instrument specifies that the donees are to act jointly and severally, a breach by one only affects the particular donee who is in breach; a valid power is created in respect of the other donees (subsection (8)).
45. Subsection (9) deals with the replacement of donees in specified circumstances and subsection (10) gives the Department vires to prescribe who may not be appointed to act as a donee.

Clause 14 – lasting powers of attorney: restrictions

46. Subsections (1) to (4) deal with acts of a donee intended to restrain the donor. Such acts are only authorised acts if the following three conditions are satisfied:
 - a. the donor lacks, or the donee reasonably believes that the donor lacks, capacity in relation to the question;
 - b. it is necessary to do the act to prevent harm to the donor;
 - c. the act is a proportionate response to the likelihood of the donor suffering harm and the seriousness of that harm.
47. Subsection (5) defines what is meant by “restraint” for the purposes of this clause.
48. Subsection (6) sets out further restrictions in respect of health and welfare powers of attorney; a donee cannot act where the donor has capacity or where the donor has made an advance decision to refuse treatment.

49. Paragraph (c) of subsection (6) is to be read in conjunction with subsection (7). Again, with respect to a health and welfare power of attorney, a donee may give or refuse consent to the carrying out or continuation of health care, this would not extend to refusing life sustaining treatment unless the instrument expressly said so.

Clause 15 - gifts

50. In the context of powers of attorney dealing with property and affairs, clause 15 acts so as to limit the ability of a donee to make gifts out of the donor's property.

51. Subsection (2) provides that the donee may, if satisfied that it is in the donor's best interests:

- a. make gifts on customary occasions to people related or connected to the donor; or
- b. make charitable gifts to charities the donor might have been expected to make.

52. Such gifts must be modest and proportionate to the donor's assets.

53. For the purposes of this section, subsection (3) defines what is meant by "customary occasion" and subsection (4) makes it clear that subsection (2) is to be subject to any conditions or restrictions in the instrument.

Clause 16 – revocation of lasting powers of attorney etc.

54. Clause 16 of the Bill deals with the revocation of lasting powers of attorney, applying to both before and after registration, i.e. where:

- a. the donor has executed an instrument with a view to creating a lasting power of attorney but has not yet registered it;
- b. a lasting power of attorney is registered as having been conferred by the donor.

55. Under subsection (2) a donor with capacity can revoke the power and the instrument conferring that power.

56. Under subsections (3) and (4)(c) the bankruptcy of either the donor or the donee will terminate any financial powers granted. More generally, subsection (4) deals with the events upon which their occurrence terminates a donee's appointment, being:

- a. the donee disclaiming the appointment;
- b. the death of the donee;
- c. where the donee is a trust corporation, its winding up or dissolution;
- d. the dissolution or annulment of a marriage/civil partnership between the donor and the donee (unless, pursuant to subsection (7) the instrument provides that it is not to do so).

57. Subsection (5) makes it clear that upon the occurrence of an event referred to in subsection (4) the power to act is revoked and also, but subject to subsection (6), the instrument conferring the power is revoked.

58. Under subsection (6), notwithstanding the occurrence of an event under subsection (4), the instrument is not revoked in the event of either of the following:

- a. the donee is replaced under the terms of the instrument;
- b. the donee is one of two (or more) persons appointed to act jointly and severally and, after the event, there is a minimum of one donee remaining.

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

59. Clause 17 sets out the consequences for donees (and others) when a registered lasting power of attorney turns out to be invalid.

60. In such circumstances a donee who acted in purported exercise of the power does not incur a liability unless they knew that a power was not created or were aware of circumstances (e.g. bankruptcy) that would have terminated their authority to act (subsection (2)).

61. Subsection (3) clarifies the position with regard to transactions entered into between the donee and a third party; such transactions are valid unless the third party had knowledge of a matter referred to in subsection (2).

62. Subsection (4) deals with the interests of a purchaser, where that interest is dependent upon the validity of a transaction between a donee and a third party (as described under subsection (3)).

Clause 18 – powers of court: validity of lasting powers of attorney

63. Clause 18 covers court powers vis-à-vis the validity of lasting powers of attorney.

64. Clause 18 gives the court a wide power to determine any question about the validity and revocation of a lasting power of attorney (subsection (2)). It has the power to direct that an instrument should not be registered (if it is unregistered) or, where the donor lacks the capacity to do so, revoke it on a ground set out under subsection (4) (fraud, undue pressure or misbehaviour on the part of the donee).

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

65. Clause 19 deals with court powers vis-à-vis the operation of lasting powers of attorney. Subsection (1) gives the court a general power to determine any question on the meaning or effect of a lasting power of attorney or an instrument purporting to create one and subsection (2) allows the court to give directions to donees where the donor lacks capacity.

66. Also the court may, where the donor no longer has capacity, give the donee directions as to the rendering of reports, accounts, the production of records and information and about their remuneration and expenses (subsection (4)).

67. Under subsection (4)(d) the court has the power to relieve a donee from liability incurred on account of a breach and subsection (5) gives the court the power to authorise gifts which are not within clause 15(2) (gifts on customary occasions and charitable gifts).

Clause 20 – register of lasting powers of attorney

68. This clause gives the Chief Registrar the function of establishing and maintaining a register of lasting powers of attorney.

Clause 21 – meaning of “P”

69. Clause 21 of the Bill opens Division 3 (general powers of the court and appointment of delegates), of Part 2 (persons who lack capacity) defining, for the purposes of the Division ‘P’ (a person who lacks capacity in relation to a health and welfare matter or a property and affairs matter).

Clause 22 – power of the court to make declarations

70. The purpose of clause 22 is to provide the court with a declaratory power about whether:

- a. a person has capacity, 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;
- b. an act that has been done, or is proposed to be done, was or would be lawful.

71. Subsection (2) clarifies that the word ‘act’ in subsection (1) includes omissions to act (e.g. withdrawing medical treatment) and a course of conduct.

Clause 23 – powers to make decisions and appoint delegates: general

72. Clause 23 states the core jurisdiction of the court in relation to individuals who lack capacity.

73. Subsection (1) gives the court jurisdiction, by order, to make decisions or appoint a person (delegate) to act on behalf of a person who lacks capacity in relation to their health and welfare or their property and financial affairs.

74. In considering whether it is in the best interests of the person lacking capacity to appoint a delegate the court is to have regard to the following two additional best interest principles:

- a. a decision of the Court is preferable to the appointment of a delegate to make a decision;
- b. if a delegate is appointed, the appointment should be as limited in scope and duration as is reasonably practicable (this re-emphasises the 'least restrictive intervention principle') (subsection (2)).

75. Subsection (3) is ancillary to subsection (1), allowing the court to grant a delegate powers or impose duties on them, the purpose being:

- a) to avoid repeated applications to the court; or
- b) to allow the court to require the delegate to seek the consent of the court before taking specified action(s).

76. Subsection (4) provides the court with a power to make orders, give directions or make appointments of its own motion, where it considers it would be in the best interests of a person lacking capacity.

77. Subsection (5) re-states, for the avoidance of doubt, the court's ability to vary or discharge an order by a subsequent order. Subsection (6) makes it clear, on the face of the Bill, the court's ability to take away or alter a delegate's power if they are not behaving in a satisfactory manner.

78. Finally, subsection (7) confirms that the court's powers under this clause are to be exercised in accordance with the overarching principles of the Bill (clause 3) and the person's best interests (clause 6).

Clause 24 – Section 23 powers: health and welfare

79. Subsection (1) provides a non-exhaustive, indicative list of health and welfare issues that the court might deal with in the exercise of its powers under clause 23. It is not a list of decisions that must always be dealt with by the court, rather those that can where it would be beneficial and appropriate for the court to do so.

80. Subsection (2) clarifies the interaction of this clause with clause 27; which limits what can be delegated to a delegate.

Clause 25 – Section 23 powers: property and financial affairs

81. Clause 25 is akin to clause 24; but with regard to matters pertaining to property and financial affairs.

82. Subsection (1) provides a list of property and financial affairs matters the court can consider pursuant to its powers under clause 23. This list is non-exhaustive, only indicative and includes matters that need not necessarily always go to the court.

83. The powers of the Attorney General with regard the management of the property and affairs of a person lacking capacity ("P") will remain unchanged. Under subsection (2), subject to any court rules, the Attorney General will continue to have the following statutory powers:

- a) the control and management of P's property;
- b) to sell, exchange, charge or otherwise deal with P's property (excluding land);
- c) acquire property in P's name (or on their behalf); and
- d) carry out a contract that P has entered into.

84. Subsection (3) mirrors section 18(3) of the Mental Capacity Act 2005 (of Parliament). This subsection clarifies that the powers of the Court regarding any other matter relating to an incapacitated person's property and affairs may be exercised even if he or she has not reached the age of 16. The Court must however be of the opinion that they will still lack capacity in respect of that matter when they reach the age of 18.

85. Subsection (4) confirms that subsection (1) is subject to section 27, which limits what can be delegated by the Court to a delegate.

Clause 26 – appointment of delegates

86. Clause 26 deals with the appointment of delegates by the court. Under subsection (1) if the matter is one regarding health and welfare the delegate must be an individual who has reached the age of 18. If the matter relates to property and financial affairs the court may, in addition to appointing a person aged 18 or over, appoint a trust corporation.
87. Unlike lasting powers of attorney the court may appoint the holder of a specified office or position as a delegate (subsection (2)).
88. Before an individual or trust corporation is appointed by the court to act as a delegate they must have given their consent to act (subsection (3)).
89. Under subsection (4) the court has the power to appoint more than one delegate and direct that they must all act together, that each can act independently of the other or that they can act either way depending on the matter at hand.
90. When the court does appoint a delegate it may also, at that time, appoint a successor to the original appointee and specify the circumstances in which the successor is to succeed the original appointee and the period of time (subsection (5)).
91. Subsection (6) sets out that a delegate is to be treated as an agent of the person upon whose behalf they are acting. By doing so, a delegate is thus subject to the law of agency which imposes upon them a range of duties, for example, a duty to act with due care and skill.
92. Subsection (7) deals with the remuneration and reimbursement of a delegate's expenses. Subsection (8) enables the court to give a delegate the power to deal with matters concerning the management of the property of the individual lacking capacity, including being able to invest.
93. Lastly, subsection (9) provides the court with a permissive power to require a delegate to give security against misbehaviour and file reports (which could be accounts) at such times as the Court may direct.

Clause 27 – restrictions on delegates

94. Clause 27 sets parameters on the powers of delegates. Subsections (1) and (2) confirm key principles of the draft Bill:

- a) a delegate is not to act in respect of a matter where the person concerned is able to act; and
- b) a delegate must act in accordance with the overarching principles of the Bill (clause 3) and the best interests of the person lacking capacity (clause 6).

95. Subsection (3) is to be read in conjunction with clauses 23 and 24; listing matters that cannot be dealt with by a delegate that must, instead, always be dealt with by the Court; these being:

- a) prohibiting a person from having contact with an adult who lacks capacity;
- b) directing a person responsible for the healthcare of an adult who lacks capacity that a different person take over that responsibility.

96. Subsection (4) prohibits delegates from settling property into trust, executing a will or exercising a power vested in an adult who lacks capacity whether beneficially, as trustee or otherwise.

97. Subsection (5) explains the interaction between a delegate's power and a donee's power under a lasting power of attorney. A delegate cannot be given a power to make a decision inconsistent with a decision of a donee (who will have been chosen by the donor, at a time when the donor had capacity).

98. A delegate is restricted, under subsection (6), from being able to refuse consent to the carrying out or continuation of life-sustaining treatment. Subsections (7) to (12) provide the conditions that must be satisfied for the restraint, by a delegate, of an adult who lacks capacity.

Clause 28 – register of delegates

99. The Chief Registrar has the function of establishing and maintaining a register of delegates¹.

¹ In Keys, at the consideration of the clauses of the Bill, a Government amendment to make provision for accessing the register of delegates was approved. Sub-sections (2) to (7) set out those amendments.

Clause 29 – supervisory functions of the Department

100. Clause 29 opens Division 4 (supervisory functions of the Department) of Part 2, setting out the Department’s functions with regard to the supervision of court appointed delegates and donees of lasting powers of attorney; these include:

- a) supervising delegates appointed by the court;
- b) ensuring delegates act in compliance with the Bill and any court order;
- c) dealing with representations, which includes complaints, about how a delegate or donee is acting;
- d) receiving reports from delegates and donees;
- e) receiving any security specified by the court;
- f) reporting to the court on such matters relating to proceedings under the Bill as the court requires; and
- g) the publishing of information that the Department thinks appropriate about the discharge of its functions.

Clause 30 – general power to institute inquiries

101. Clause 30 gives the Department the power to instigate an inquiry with regards to any matters referred to in clause 29 either generally or for specific purposes. Subsection (3) permits the Department to either conduct the inquiry or appoint another person to do so.

Clause 31 – obtaining evidence etc. for purposes of inquiry

102. This clause sets out procedures by which the Department can conduct such an inquiry, including obtaining evidence.

103. For the purpose of such an inquiry, subsection (2) provides that the Department may direct any person: -

- a) to provide evidence such as accounts or written statements, or to provide written responses to questions and to verify such accounts, statements or answers by statutory declaration;
- b) to provide copies of documents that relate to the subject matter of the inquiry and verify such copies by statutory declaration;
- c) to attend at a specified time and place and give evidence or produce documents;
- d) to attend at a specified time and place for an interview.

104. Subsection (3) allows the Department to examine and take copies of any health record, any record held by Manx Care in connection with its prescribed functions and any record held by a person registered under Part 3 of the Regulation of Care Act 2013.

Clause 32 – access to records

105. Continuing with the Department's powers in relation to information, this clause provides that the Department (in the execution of its functions under the Bill) may examine and take copies of records relating to the appointment of receivers, including accounts.

Clause 33 – regulations

106. The Department may make regulations in connection with its functions under clause

29. Subsection (2) provides that such regulations may provide for: -

- a) the giving of security by a delegate;
- b) the enforcement and the discharge of security that has been provided;
- c) the making of reports to the Department by delegates, donees or any other person acting on behalf of a person who lacks capacity.

107. Subsection (3) provides that before making any regulations under this clause, the Department has to consult with the Attorney General and the Deemsters².

Clause 34 – meaning of “A”

108. Clause 34 opens Division 5 (advance decisions to refuse treatment) of Part 2. A definition is provided for “A” (a term used throughout the Division) as meaning a person who at the time of making an advance decision had capacity to do so and had reached the age of 16.

Clause 35 – advance decisions to refuse treatment: general

109. Clause 35 sets out the key characteristics of an advance decision to refuse treatment (sometimes known as a living will).

110. Subsection (1) defines what an advance decision is, namely a decision that a person makes now when they have capacity, to refuse a specific type of treatment in the future if they are not, at that time, able to communicate their wishes because they lack the capacity to do so.

111. Subsection (2) provides that an advance decision to refuse treatment can be expressed in layman’s terms and the following subsections deal with the withdrawal or alteration of an advance decision.

Clause 36 – validity and applicability of advance decisions

112. Clause 36 sets out when an advance decision is valid and is to be applied. Subsection (1) deals with the liability of a person treating someone who lacks capacity; an advance decision does not affect liability unless the decision is, at the material time, valid and applicable to the treatment.

113. Subsection (2) clarifies the circumstances in which an advance decision is not valid, for example, where a person has previously withdrawn the decision when they had capacity to do so.

² In Keys, at the consideration of the Bill’s clauses, a Government amendment to the clause was moved to require the Department to also consult those whom it considers appropriate to do so.

114. Subsections (3) and (4) deal with the applicability of advance decisions to treatments where life is at risk.

115. Subsection (5) confirms that the existence of a lasting power of attorney, other than one of a description mentioned in subsection (2)(b) does not stop an advance decision from being valid and applicable.

Clause 37 – effect of advance decisions

116. Subsection (1) confirms that if a person has made an advance decision which is valid and applicable to a treatment, it's as if they had made it (and had capacity to make it) at the time when the question arises whether the treatment should be carried out/continued.

117. In the context of advance decisions subsections (2) and (3) deal with the liability of the person treating an individual who lacks capacity.

118. Subsection (2) makes it clear that no liability is incurred by a person carrying out or continuing a treatment unless they are satisfied that a valid and applicable advance decision exists. Subsection (3) confirms that a person does not incur liability if they withhold/withdraw treatment if they reasonably believe it to be in accordance with a valid, applicable and existing decision.

119. Subsection (4) deals with court powers. Subsection (5) clarifies that a person can provide life-sustaining treatment or indeed any act reasonably believed to be necessary to prevent a serious deterioration in the individual's condition while a determination is sought from the court on the validity/applicability of an advance decision.

Clause 38 – family matters

120. Clause 38 opens Division 6 (supplemental) of Part 2, setting out certain family matters that are outside the remit of the Bill, listing certain decisions that can never be made under the Bill on behalf of a person who lacks capacity. For example, if a birth parent lacks capacity to consent to the making of an adoption order the rules as to dispensing with consent in the adoption legislation will apply. It will not be the case of a donee being able

to consent, the court making an order under this Bill or appointing a delegate to provide the requisite consent.

Clause 39 – mental health matters

121. Clause 39 sets out those Mental Health Act matters that are outside the scope of the Bill. Subsection (1) clarifies that nothing in the Bill authorises a patient being given medical treatment for a mental disorder or authorising a person to consent to such a course of action if the patient is, at that time, being treated in accordance with the Mental Health Act 1998.

122. Subsection (2) defines “medical treatment”, “mental disorder” and “patient” as having the same meaning as in the Mental Health Act.

Clause 40 – voting rights

123. Clause 40 confirms that the Bill does not act so as to permit a person to vote on behalf of a person who lacks capacity, at an election for a public office or at a referendum. Subsection (2) then defines “referendum”.

Clause 41 – research

124. Clause 41 deals with intrusive research on, or in relation to, a person who lacks capacity to consent to it. Subsection (1) provides that such research can only be carried out in accordance with this clause and subsection (2) that in all cases the interests of the incapacitated person outweigh those of science and society.

125. Subsection (3) introduces subsections (4) and (5) requiring intrusive research to be carried out in accordance with the conditions specified in those subsections.

126. Subsection (6) states that nothing may be done in the course of the research:

- a) to which the person appears to object (unless it is being done as a protection from harm or the prevention/reduction of pain or discomfort); or
- b) which would be contrary to an advance decision or any other valid statement that the person conducting the research is aware of.

127. Subsection (7) gives the Cabinet Office the vires to make regulations about intrusive research³.

Clause 42 – ill-treatment or neglect

128. This section makes it an offence for a person who cares for a person lacking capacity to ill-treat or wilfully neglect them.

129. Subsection (2) clarifies that “ill treatment” may consist of a single event or a course of conduct (whether by act or omission) and does not have to result in damage or a threat of damage to a person’s health.

130. Subsection (3) sets out the maximum penalties for a person found guilty of such an offence.

Clause 43 – meaning of “Code”

131. Clause 43 of the Bill opens Division 7 (codes of practice) of Part 2 (persons who lack capacity) and states that in this Division, “code” means a code that is prepared, approved or revised under clause 44 (codes of practice).

Clause 44 – codes of practice

132. Clause 44 requires the Department to either prepare and issue a code of practice or apply to the Island a code of practice (with or without adaptations and modifications) that has been made under the Mental Capacity Act 2005 (of Parliament).

133. Under this clause, the Department has a statutory power to revise an existing code of practice and may delegate the preparation or revision of it, or part of it, to another person.

134. Subsection (5) sets out who is to have a legal duty to have regard to the code of practice, namely; donees of lasting powers of attorney; delegates appointed by the court;

³ In Keys, at the consideration of the Bill’s clauses, a Government amendment was moved to require the Director of Public Health to concur with any such regulations being made.

anyone carrying out research under the Bill; and anyone acting in a professional capacity or for remuneration.

135. Subsection (6) allows for any provision of the code of practice or a failure to comply with a provision of that code, if relevant to a court or tribunal proceeding, to be taken into account in deciding the question at hand.

Clause 45 – codes of practice: procedure

136. Clause 45 deals with procedural matters; requiring the Department to consult such persons it considers appropriate in the preparation or revision of a code; requiring a code to be laid before Tynwald before being issued; and finally requiring the Department to publish the code in a manner appropriate for bringing it to the attention of those concerned⁴.

PART 3 – INTERIM ORDERS AND DIRECTION ETC

Clause 46 – interim orders and directions

137. Clause 46 opens Division 1 (interim orders and directions) of Part 3 (interim orders and directions etc) of the Bill; giving the court the power to make orders or give directions, pending the determination of an application. This is however limited to circumstances where there is reason to believe that the person, to which the application relates, lacks capacity in relation to the matter; the matter is one which powers under the Bill extend to the court; and that it is in the person's best interest to act without delay.

Clause 47 – power to call for reports

138. Clause 47 sets out the courts powers in relation to proceedings, specifically when the court is considering a question in relation to a person ("P") under the Bill. Under subsection (2) the court may require a report to be made to it by the Department, Manx Care or such other person, as the court may direct.

⁴ At the consideration of the Bill's clauses in Keys minor, technical amendments were moved by the Government to clause 45 to ensure consistency in approach regarding revisions and approvals.

139. Under subsection (3) the court may direct a person referred in subsection (2) above, who is appropriately qualified to carry out a medical, psychiatric or psychological examination of P.

140. Subsection (4) states that court rules may specify matters which must be dealt with in such reports. Subsection (5) makes it clear that reports must also deal with such other matters relating to P as the court may direct. For the purposes of enabling compliance with subsection (5), subsection (6) provides ancillary powers for those persons referred to in subsection (2).

141. Lastly, subsection (7) confirms that it is up to the court as to whether a report is made in writing or orally.

Clause 48 – applications to the court

142. Clause 48 opens Division 2 (practice and procedure) of Part 3. Subsection (1) specifies who may apply to the court as of right. Subsection (2) clarifies that, subject to court rules, for anyone else, the court's permission would be required to apply.

143. Subsection (3) sets out the matters the court is to have regard to in deciding whether to grant, when required, permission to apply.

Clause 49 – high court rules

144. For the purposes of court practice and procedure, clause 49 makes provision regarding court rules. Subsection (1) makes it clear that court proceedings have to be conducted in accordance with such rules and subsections (2) and (3) specify what such rules may include (for example, the manner and form in which proceedings are to be commenced).

145. Subsection (4) provides that court rules may refer a matter to be dealt with by way of practice direction rather than in the rules themselves.

Clause 50 – rights of appeal

146. Clause 50 deals with the rights of a person to appeal a decision of the court made pursuant to or in respect of a person who lacks capacity.

PART 4 – MISCELLANEOUS AND GENERAL

Clause 51 – application to the Island of Acts of Parliament etc.

147. Under subsection (1) the Department may, by order, apply relevant UK legislation to the Island. The Department can make modifications, adaptations and exceptions to the legislation that is being applied to ensure that it is fit for the Island. Subsection (2) clarifies that consequently, any provision (other than a provision of this Bill) that is inconsistent with such an order may be repealed or amended.

148. Subsection (3) adds detail, setting out what an order under subsection (1) may do, for example:

- a) it may specify the exceptions, adaptations and modification subject to which the UK legislation applies to the Island; and
- b) in the case of an order applying UK legislation that amends previously applied UK legislation, it may set out the previous legislation so it is applied as amended.

149. Subsection (4) sets out which UK legislation this clause covers, specifically:

- a) the Mental Capacity Act 2005 (of Parliament);
- b) any Act of Parliament⁵ relating to or concerning mental capacity or capacity legislation;
- c) any amending legislation which makes changes either directly or indirectly to either of the above;

⁵ In Keys, at the consideration of the clauses of the Bill, a Government amendment to clause 51 was moved, to allow the Department to apply relevant legislation from the devolved legislatures of Scotland, Wales and Northern Ireland.

- d) any statutory instrument made or having effect as if made under a Parliamentary Act that relates or is concerned with mental capacity.

Clause 52 – interpretation

150. Clause 52 provides definitions for the purposes of the Bill.

Clause 53 – regulations

151. Clause 53 gives the Department a general regulation making power and makes provision for the relevant Tynwald procedure.

152. Subsection (3) states the Tynwald procedure for regulations which would modify section 3 (the principles), section 4 (lack of capacity), section 5 (inability to make decisions) or section 6 (best interests) of the Bill: Tynwald approval required.

153. Subsection (4) provides that any other regulations made under this clause, not falling within subsection (3), would be subject to section 32 of the Legislation Act 2015: negative procedure.

Clause 54 – existing receivers and enduring powers of attorney etc.

154. As well as repealing Part 7 of the Mental Health Act 1998 (management of property and affairs of patients), clause 54 provides that no enduring powers of attorney made under the Powers of Attorney Act 1987 can be created after the Bill becomes operational. Further, it introduces Schedule 3, which provides for transitional provisions and savings in relation to Part 7 of the Mental Health Act 1998.

Clause 55 – minor and consequential amendments and repeals

155. Clause 55 signposts Schedule 4 which deals with the minor and consequential amendments that result from the Bill and Schedule 5 which tables statutes, or parts thereof, that are to be repealed.

SCHEDULE 1

Lasting Powers of Attorney: Formalities

PART 1 – MAKING INSTRUMENTS

156. This Part sets out the requirements with regard to the form and execution of an LPA. A document which fails to comply with the provisions of this Schedule or regulations made under it, will generally speaking, not create an LPA and thus not confer any powers on a donee.

Paragraph 1 – general requirements as to making instruments

157. Paragraph 1 introduces the formalities in respect of making instruments: -

- a) Sub-paragraph (1) sets out the requirements with regard to the form and execution of an LPA, namely that it must be in a prescribed form, comply with paragraph 2 and any other requirements prescribed in regulations in connection with its execution.
- b) Sub-paragraph (2) confirms that regulations made under Schedule 1 may make regulations; that is to say the Department may make different provisions for either a health and welfare or a property and financial affairs instrument (or both). Also regulations may prescribe how many donees are appointed, whether that be one or multiple and whether that be on a joint or joint and several basis.
- c) Sub-paragraph (3) provides definitions of “prescribed” and “regulations”, for the purposes of Schedule 1.

Paragraph 2 – requirements as to content of instruments

158. The requirements as to the content of instruments are covered in paragraph 2(1), specifically that the instrument must include:

- a) information on the purpose of the instrument (as set out in regulations);
- b) a statement by the donor confirming they have read the prescribed information or a prescribed part of it (or had it read to them) and intend the authority conferred

under the instrument to include authority to make decisions on their behalf in the event that they lose capacity;

- c) the names of those the donor wishes to notify of an application to register the instrument;
- d) a statement by the donee/s to the effect that they have read the prescribed information or a prescribed part (or had it read to them) and understand the duties imposed on them under sections 3 (the principles) and 6 (best interest decisions) of the Bill;
- e) a certificate by a person of a prescribed description ("the certificate provider") that in their opinion, the donor understands the purpose of the instrument, the scope of the authority to be conferred, that no fraud or undue pressure is present and that there is nothing else preventing the instrument from being created.

159. Sub-paragraph (2) states that regulations may prescribe a maximum number of notifiable people and the order in which such people are to be notified.

160. Sub-paragraph (3) states that the certificate made under sub-paragraph (1) must be in the prescribed form. Sub-paragraph (4) states that the certificate provider must not be a donee appointed under the instrument.

Paragraph 3 – failure to comply with prescribed form

161. Paragraph 3(1) provides that if an instrument differs in an immaterial way in respect of form or expression, then it may be treated by the Chief Registrar as sufficient in this respect. Further in sub-paragraph (2), if the court is satisfied that the persons executing the instrument intended for it to create an LPA, then it may declare for that instrument to be treated as if it were in the prescribed form.

PART 2 – REGISTRATION

162. The powers conferred by an LPA cannot be exercised by a donee until the document has been registered. To register an LPA an application must be made by the donor or donee/s to the Chief Registrar. Part 2 of Schedule 1 to the Bill covers applications and procedure for registration.

Paragraph 4 – application and procedure for registration

163. Paragraph 4 provides that an application for the registration of an instrument to the Chief Registrar must be in the prescribed form and include the prescribed information. Applications may be made by the donor, by the donee or donees (either acting jointly or severally) and must be accompanied by the instrument and any fee payable⁶.

164. Sub-paragraph 4 makes it an offence for any person who in the application to register an instrument, makes a statement which they know to be false.

Paragraph 5

165. Subject to sub-paragraphs 11-14, the Chief Registrar must register the instrument as an LPA at the end of the period set out in regulations.

Paragraphs 6, 7, 8 and 9 – notification requirements

166. The requirement to notify people of an application to register an LPA is a safeguarding measure built in to protect the donor. Paragraph 6 deals with the notification requirement of registering an LPA, covering the different instances when either the donor or the donee/s apply to register the LPA.

167. Continuing with the notification requirements, paragraphs 7 and 8 provide that as soon as is practicable, after receipt of an application by either the donor or the donee/s, the Chief Registrar must, depending on who made the application, notify the donor, the donee/s and each notifiable person as appropriate.

168. Paragraph 9 provides that a notice must be in the prescribed form and include such information as may be prescribed.

Paragraph 10 – power to dispense with notification requirements

⁶ In Keys, at the consideration of the clauses of the Bill, an amendment was moved to paragraph 4(3)(b) replacing the reference to “court rules” with “section 81 of the Interpretation Act 2015”, the latter being the correct power under which any fee would be levied.

169. Under this paragraph, on an application by either (a) the donor or (b) the donee/s, the court has the power to dispense with the requirement to notify, if satisfied that no useful purpose would be served by giving notice.

Paragraph 11 – instrument not made properly or containing ineffective provision

170. In the event that an instrument accompanying an application under paragraph 4 is not made in accordance with this Schedule, then under sub-paragraph (1) the Chief Registrar must not register the instrument (unless directed to do so by the court).

171. Pursuant to sub-paragraph (2), if any part of the instrument appears to the Chief Registrar to be ineffective or prevent the instrument operating as a valid LPA, then as per sub-paragraph (3), an application can be made to the court to determine the matter pending which, the Chief Registrar must not register the instrument.

172. Sub-paragraphs (4)⁷, (5) and (6) set out the procedure to be followed in the event that the instrument (or a part of it) is ineffective or would prevent it from operating as an LPA; the court must notify the Chief Registrar that it has severed the provision, or direct the Chief Registrar not to register the instrument. Any instrument with a severed provision must be registered by the Chief Registrar with a note to that effect.

Paragraph 12 – delegate already appointed

173. Unless instructed by the court to do so, the Chief Registrar must not register an instrument, if it appears that there is a delegate already appointed by the court for the donor, and the powers conferred on that delegate would conflict with any of the powers conferred by the instrument.

Paragraph 13 – objection by donee or notifiable person

174. Paragraph 13 sets out the process for objecting to an application to the registration of an LPA instrument.

175. Sub-paragraph (1) states that where:

⁷ In Keys, at the consideration of the Bill's clauses, a Government amendment was moved to sub-paragraph (3) omitting an incorrect reference to "(whether or not on an application by the Chief Registrar)".

- a) a donee or a notifiable person receives notice of an application to register an LPA, and
- b) before the end of the prescribed period gives notice to the Chief Registrar of an objection on the ground that an event pursuant to section 16(3) or (4) of the Bill has occurred,

then sub-paragraph (4) applies (this is known as a factual objection).

176. Sub-paragraph (2) opens up who may object to the registration of an LPA - to people beyond those who are a party to the instrument. Specifically, it allows for people who fall within the sub-paragraph (3) definition of qualified person (a medical practitioner, a constable, a member of the legal profession and any other prescribed person) to make an objection.

177. Sub-paragraph (4) states that if the Chief Registrar is satisfied that the ground for making the objection is established, then they must not register the instrument unless, upon an application by the person who is applying to register the instrument, the court is satisfied that the ground is not established and directs the Chief Registrar to register the instrument.

178. While sub-paragraph (1) permits objections on factual grounds (under section 16(3) or (4)), sub-paragraph (5) allows for objections on a prescribed ground. Thus if the donee or a notifiable person:

- a) receive a notice of an application to register an instrument; and
- b) before the end of the prescribed period they make an application to the court objecting to the registration on a prescribed ground,

the Chief Registrar must not register the instrument unless directed by the court to do so (this is known as a prescribed objection).

Paragraph 14 – objection by donor

179. Under paragraph 14, following the receipt of a notice under paragraph 8, but before the end of the prescribed period, the donor may object to an application to registration of an LPA instrument made by the donee/s on their behalf.

180. Sub-paragraph (2) states that the Chief Registrar must not register the instrument unless the court, on the application of the donee/s, is satisfied that the donor lacks capacity to object to the registration and directs the Chief Registrar to register the instrument.

Paragraph 15 – notification of registration

181. When an instrument has been registered in accordance with this Schedule, the Chief Registrar must give notice in the prescribed form to the donor, the donee/s and each notifiable person.

Paragraph 16 – evidence of registration

182. Paragraph 16 provides that an office copy of a registered instrument is evidence of its content and registration. Sub-paragraph (2) clarifies that this provision is without prejudice to any other method of proof authorised by law.

PART 3 – CANCELLATION OF REGISTRATION AND NOTIFICATION OF SEVERANCE

183. The Chief Registrar can cancel an LPA if satisfied that the power has been revoked.

Paragraphs 17 - 20

184. Paragraph 17 provides that in accordance with the provisions of this Bill, the Chief Registrar must cancel the registration of an LPA on being satisfied that the power has been revoked by the donor's bankruptcy, or on the occurrence of a section 16(4) event. Further, if the Chief Registrar cancels the registration of an instrument, the donor, donee/s and each notifiable person must be notified.

185. With regard to the validity of an LPA, under paragraph 18 the court must direct the Chief Registrar to cancel the registration of an LPA if it determines that a requirement for

creating the power was not met (section 18(2)(a)), the power has been revoked (section 18(2)(b)) or if the court revokes the power under section 18(3)(b)⁸.

186. Regarding the operation of an LPA, under paragraph 19, if the court determines⁹ that an LPA contains a provision that is ineffective or prevents the instrument operating as a valid LPA, then the court must notify the Chief Registrar that it has either severed the provision, or direct the Chief Registrar to cancel its registration.

187. Paragraph 20 provides that on the cancellation of the registration, the instrument and any office copies of it must be delivered up to the Chief Registrar for cancellation.

PART 4 – RECORDS OF ALTERATIONS IN REGISTERED POWERS

188. The Chief Registrar must attach notes to an LPA pursuant to a revocation, or when there has been a change to the appointment of the donee/s.

Paragraph 21 – partial revocation or suspension of power as a result of bankruptcy

189. Paragraph 21 provides that if an event specified in section 16 of the Bill has occurred revoking an instrument in relation to property and financial affairs only, the Chief Registrar must attach to the instrument a note to that effect.

Paragraph 22 – termination of appointment of donee which does not revoke power

190. This paragraph requires the Chief Registrar to attach a note to an instrument if an event has occurred terminating the appointment of the donee.

Paragraph 23 – replacement of donee

191. If it appears to the Chief Registrar that the donee has been replaced under the terms of the instrument, they must place on it a note to that effect.

Paragraph 24 – severance of ineffective provisions

⁸ Clause 18(3)(b) states that where the court is satisfied of any matters referred to in subsection (4), it may - if P lacks capacity to do so, revoke the instrument or power in relation to a donee/s.

⁹ Under section 19(1) of the Act.

192. If the court notifies the Chief Registrar (under paragraph 19(2)(a) of this Schedule) that it has severed a provision in the instrument, they must attach a note to that effect.

Paragraph 25 – notification of alterations

193. If the Chief Registrar attaches any note to an instrument, they must give notice of such a note to the donee/s.

PART 5 – INSTRUMENTS IN OVERSEAS FORM

194. This part sets out the Department's vires in respect of giving effect, on the Island to, overseas instruments.

Paragraph 26 – power of attorney in overseas form

195. Sub-paragraph (1) acts to confirm which instruments paragraph 26 applies to, i.e. instruments prepared in the prescribed form under the law of a prescribed jurisdiction and which have the effect of conferring authority on a named person on behalf of the person making the instrument.

196. Pursuant to paragraph 26(2) the Department has a regulation making power to permit that such an instrument shall have legal effect on the Island. However, nothing in regulations can enable anything illegal (i.e. contrary to Island law) to be done by an agent or donee under that instrument.

PART 6 – REGISTER OF LASTING POWERS

Paragraph 27 – the register of lasting powers

197. The Chief Registrar has the function of establishing and maintaining a register of LPAs, as referred to in section 20.

Paragraph 28 – disclosure of information on a register

198. Paragraph 28 sets out the terms upon which the Chief Registrar can release information on the Register. Any application to carry out a search of the register must be accompanied by the prescribed fee (if any). The Chief Registrar has the discretion to

determine what information must be provided on an application, including the purpose for carrying out the search. The Chief Registrar can determine what further information is necessary to carry out a search. The Chief Registrar must as soon as practicable then notify the applicant of the search result.

199. The Chief Registrar may also produce an office copy of a registered instrument.

SCHEDULE 2

Property and Financial Affairs: Supplementary Provisions

200. Schedule 2 provides detail relating to the courts powers in respect of property and financial affairs, in particular the making of wills and settlements.

Paragraphs 1-4 – wills: general

201. Paragraphs 1-4 deal with wills that can be made on behalf of a person aged 18 or over, who lacks capacity. These are more generally known as statutory wills.

Paragraphs 5-6 – vesting orders ancillary to settlement and variation of settlements

202. Paragraphs 5 and 6 set out provisions for settlements, which are the legal transfer of a person's property into a trust.

Paragraph 7 – vesting of stock in curator appointed outside the Island

203. Paragraph 7 empowers the court to direct the transfer of stocks to a person appointed outside of the Island. The definition of stocks is defined at sub-paragraph (3).

Paragraph 8 – preservation of interests in property disposed of on behalf of person lacking capacity

204. Paragraph 8 makes provision for the protection of interests in property which have been disposed of, on behalf of a person who lacks capacity. Thus where property has been disposed of, any person who is entitled (either under the terms of a will or intestacy)

to that property or a share thereof, then that person so entitled receives the same or an equivalent interest in the property, in so far as circumstances allow.

Paragraph 9 – permanent improvements and benefits

205. Under this paragraph, the court may order that any money spent on the improvement or permanent benefit of an incapacitated person's property, then the whole or any part of the expenditure is to be charged either with or without interest at a specified rate. However, no such charge may confer a right of sale or foreclosure whilst the incapacitated person is alive.

Paragraph 10 – patronages

206. This paragraph is based on a like provision in the Mental Capacity Act 2005 (of Parliament). It specifies that only a representative appointed by the Court may exercise the powers which the person concerned has as patron of a benefice. A benefice is a freehold office in the Church of England, such as the vicar or rector of a parish, and the patron of a benefice has the right to present a priest for admission to that benefice. The representative must be an individual capable of appointment by a patron as his representative under section 8(1)(b) of the Patronage (Benefices) Measure 1986 as applied to the Island by the Patronage Measure of (Isle of Man) Act 1997.

SCHEDULE 3

Transitional Provisions and Savings

207. Schedule 3 sets out transitional arrangements and savings arising from section 58, specifically the repeal of Part 7 of the Mental Health Act 1998.

208. In particular, paragraph 1 sets out provisions for enabling receivers appointed under the Mental Health Act 1998 to continue. It provides that after implementation the Bill shall apply as if any receiver for the person were, in fact, a delegate appointed in relation to that person, but only with the functions they had as a receiver. Paragraphs 2-5 allows for the continuation of procedural matters (e.g. appeals and other legal proceedings) relating to receivership appointments which remain in place at the time the Mental Health Act 1998 is repealed.

SCHEDULE 4

Minor and consequential amendments

209. Schedule 4 sets out minor and consequential amendments required as a result of the Bill coming into operation.

SCHEDULE 5

Repeals

210. Part 7 of the Mental Health Act 1998 will be repealed.

Appendix 1 – Impact Assessment

DEPARTMENT OF HEALTH AND SOCIAL CARE		
IMPACT ASSESSMENT: CAPACITY BILL		
Stage: 12 – Council approval to introduce legislation into Branches	Version: 8	Date: 21 April 2022
Related Publications: a) Capacity Bill and Explanatory Memorandum (Vol8);		

- b) Explanatory Notes for Tynwald Members;
- c) Capacity Bill Policy Consultation and Report;
- d) Capacity Bill Consultation and Report;
- e) Treasury Paper; and
- f) Equality Impact Assessment.

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SUMMARY: INTERVENTION AND OPTIONS

Briefly summarise the proposal's purpose and the intended effects

Background

1. Every day people make decisions about their health and wellbeing. For example we decide what to eat, whether to exercise, how much we drink and when we need to see a doctor.
2. People take decisions based on what is the right thing for them at that time; they act "in their own best interest". Most adults know what is right for them and can therefore make their own decisions. These rights are protected by law.
3. However if a physical or mental illness affects a person's thinking, temporarily or permanently, they may not be able to make a decision for themselves, or may make a decision that they would not make normally.

4. When a person is unable to make a decision because they are unable to understand it or the factors which go into it, we say they lack capacity to make that decision. For example, people with dementia, learning disabilities, mental health problems, and stroke or head injuries may lack capacity to make certain decisions. Alternatively, it may be because at the time the decision needs to be made, they are unconscious or barely conscious, whether due to an accident or being under anaesthetic.
5. There is currently no comprehensive statutory framework on the Island for those who are unable to make decisions for themselves, or those who cannot communicate their decisions. These are some of the most vulnerable people in our society.
6. Currently decisions taken on behalf of people who are considered to lack capacity and the treatments that are administered are undertaken in their best interests and in accordance with the common law doctrine of necessity. These decisions are made by a range of people from carers providing care in a person's home to nurses or doctors in a hospital.
7. The lack of a legal framework causes issues for health and social care professionals, carers, relatives and the individuals themselves who may lack capacity.

Proposal

1. The Department is proposing to introduce primary legislation to create a statutory framework to better support and protect people who may lack capacity. The Department is broadly following the overarching principles of capacity as set out in the E&W Mental Capacity Act 2005 (**MCA 2005**). The MCA 2005, amongst other things, codified the common law position; a position that is still being used in the Island today.
2. However, whilst the new statutory framework for the Island will draw inspiration from the MCA 2005, the framework takes into account the differences in the Island; in particular our existing legislation, size, available resources and different judicial system. Thus in certain circumstances the Department will be deviating from the position in England and Wales.

3. Regarding the introduction of mental capacity legislation, in July 2020 the Department agreed to a two phased approach. That approach was subsequently endorsed by the current Board of the Department in autumn 2021.
4. This document assesses only the impact of phase one. However for information the work that will form a part of phase 2 is detailed below.
5. The first phase is a Capacity Bill, with an accompanying Code of Practice, to put on a statutory footing the following:
 - a) the overarching principles of capacity, starting with the presumption that a person has capacity;
 - b) defining what is meant by "a person who lacks capacity";
 - c) the test for establishing whether a person is unable to make a decision about a matter;
 - d) what must and must not be considered for the purposes of determining what is in a person's best interests;
 - e) the creation of lasting powers of attorney, to replace the existing enduring powers of attorney;
 - f) court appointments to act on behalf of persons who have lost the capacity to make decisions;
 - g) 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);
 - h) decisions of a very personal nature that cannot be taken on behalf of another person (excluded decisions);

- i) the consequences of the ill-treatment or neglect of a person lacking capacity; and
 - j) research on, or in relation to, a person who lacks capacity.
6. The Department will be required, under the draft Bill, to issue a Code of Practice to provide guidance to those who act or make decisions on behalf of a person who lacks capacity.
7. The second phase will update the Island's capacity laws to address the following:
- a) Deprivation of liberty safeguards/ liberty protection safeguards
 - i. People may be deprived of their liberty in different settings by virtue of the type of care or treatment that they are receiving, or the level of restrictive practices that they are subject to but, because they lack the mental capacity to do so, they cannot consent.
 - ii. At present the legal mechanism in place in the Island for depriving persons lacking capacity of their liberty is the common law doctrine of necessity. The Department acknowledges that reliance on the doctrine of necessity is no longer adequate and notes the sixth recommendation in the Social Affairs Policy Review Committee second report on mental health that mental capacity legislation containing liberty protection safeguards be drafted and introduced into the branches of Tynwald.
 - iii. Further, the common law doctrine of necessity is not adequate to meet the requirements of article 5 of the European Convention on Human Rights in addressing the care and treatment of an adult without mental capacity in respect of whom an action, or a combination of actions, are undertaken that could amount to a 'deprivation of liberty'.
 - iv. Thus, the Department's intention is that phase 2 will establish a statutory framework to address liberty protection safeguards. Specifically it will establish a scheme which sets out the assessment and, where appropriate, authorisation of a deprivation of liberty but which safeguards and protects the rights and welfare of the relevant persons.

v. In considering the statutory framework for liberty protection safeguards the Department will give due consideration to the amendments that were made to the MCA 2005 by the Mental Capacity (Amendment) Act 2019 (Parliament) and the updated Code of Practice which includes guidance on the new Liberty Protection Safeguards that the UK Department of Health and Social Care and the Ministry of Justice are currently consulting on (17 March – 7 July 2022).

b) Independent Capacity Representatives

- i. The Department is proposing that phase 2 will put on a statutory footing 'Independent Capacity Representatives'.
- ii. The purpose of the role of Independent Capacity Representatives will be similar to that of the 'IMCA' (independent mental capacity advocate) in England and Wales, i.e. to afford appropriate provision for help and representation for 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 an LPA or a court appointed delegate.

What are the options that have been considered

1. In October 2022 the newly formed Department considered Capacity legislation, noting the stance of the previous Council of Ministers; opting to legislate but to do so in two phases (as outlined above).
2. Essentially the Department considered three options, namely,
 - a) to maintain the status quo;
 - b) to legislate and do so by continuing with the existing two phase approach; or
 - c) to marry together phases one and two, the result being that liberty protection safeguards and independent mental capacity representation would be dealt with together with those matters currently listed in phase one.
3. Option one – status quo
 - a) The first option considered was to maintain the status quo. By doing so, the Island would continue, unlike any of its neighbouring jurisdictions, to have no statutory

framework for the making of decisions on behalf of individuals who lack the capacity to make decisions for themselves. The making of such decisions would continue to be made under the common law doctrine of necessity.

- b) In considering maintaining the status quo the Department noted previous attempts and commitments given to bring forward mental capacity legislation. It noted also the Social Affairs Policy Review Committee's second report of 2018-19 that mental capacity legislation containing deprivation of liberty safeguards be drafted and introduced into the Branches of Tynwald. Lastly, it noted a general perception that the Department/Government has taken too long to bring forward legislation on mental capacity.
- c) The lack of a statutory framework adversely impacts on those who lack the capacity to make decisions for themselves, health and welfare professionals, medical professionals and people who voluntarily help and care for people who lack capacity.
- d) The Department considers that it is not appropriate to continue to rely on the doctrine of necessity. It is essential that the provision of services for people who may have lost the capacity to make decisions for themselves are underpinned with a modern and clear legal framework which safeguards the rights, dignity and wellbeing of those individuals.

4. Option two – to legislate on mental capacity in two phases

- a) The second option the Department considered was to continue with the approach decided upon by the previous administration, i.e. bring forward mental capacity legislation in two phases.
- b) The Capacity Bill (phase one), if brought into operation, will govern decision-making for individuals who may have lost the capacity to make decisions for themselves, it will provide assurance that they will be supported to make a decision for themselves wherever possible and will have decisions made in their best interests where it is not.
- c) Phase two of capacity legislation will, as detailed above, primarily deal with liberty protection safeguards and independent mental capacity representatives.
- d) Regarding liberty protection safeguards the Department noted:

- i. the deprivation of liberty scheme was introduced in England in Wales in 2009, this followed the decision of the European Court of Human Rights in *HL vs United Kingdom*. The Court ruled that individuals who lacked capacity and were being deprived of their liberty under the common law (not the Mental Health Act) were being denied the safeguards required under article 5 of the European Convention on Human Rights;
 - ii. deprivation of liberty schemes have been the subject of criticism since inception; the House of Lords Select Committee on the MCA found in its 2014 post-legislative scrutiny report that the legislation was not fit for purpose;
 - iii. the Supreme Court decision in the case of *Cheshire West* (2014). A decidedly wider interpretation of deprivation of liberty was given, the result of which was to considerably increase the number of people treated as being deprived of liberty and correspondingly increased the obligations on local authorities in connection with authorising, and providing safeguards for, these extra deprivations of liberty;
 - iv. following that case the Law Commission were asked by the Government to review this area of law; their report, which included a draft Bill, called for a new scheme, more proportionate and less bureaucratic;
 - v. the Government accepted that the current DoLS system should be replaced and broadly agreed with the model set out in the Commission's draft Bill; the amendments set out in the Mental Capacity (Amendment) Act 2019 (**2019 Act**) are broadly based upon the Law Commission's recommendations;
- e) When considering the options available to the Department the amendments proposed by the 2019 Act were not operable; the Department considered it would be prudent to await sight of the revised Code of Practice and regulations which will underpin the new system¹⁰. Further the Department noted that work on phase one was fairly well advanced with a draft Bill, dealing only with phase one matters, having been the subject of a public

¹⁰ It is noted that as at the date of this Assessment the UK Department of Health and Social Care and the Ministry of Justice are consulting on proposed changes to the Mental Capacity Act 2005 Code of Practice to include guidance on the new liberty protection safeguards and regulations that will underpin the new system.

consultation from February to April 2021. There is a public expectation of a Capacity Bill dealing with phase one matters being introduced into the Legislature.

5. Option 3 – to legislate but bring phases one and two together

a) The third option the Department considered was to marry phases one and two together so that liberty protection safeguards and independent mental capacity representatives would be dealt with by this Bill. The Department noted this would impact upon the existing timetable, public expectation and at that time that the amendments proposed by the 2019 Act were not yet operable.

6. Preferred option

a) Option 2 is the Department's preferred option.

Link to Government Strategic Plan

The vision of the Island Plan is to build a secure, vibrant and sustainable future for the Island's community which, amongst other things, includes an Island where everyone feels safe.

The Island Plan also recognises existing critical issues that must be responded to and commits to address such issues as they exist in the health and social care setting and to tackle the challenges posed by the Island's ageing population.

The Capacity Bill (Phase 1) is on the Government's legislative programme for introduction into the Legislature in this Parliamentary year.

In the context of the Island Plan, the Bill:

a) addresses a critical issue in health and social care; i.e. the lack of a legal framework which safeguards the individual rights, dignity and wellbeing of people who may have lost the capacity to make decisions for themselves; and

b) given that mental incapacity disproportionately affects the more elderly, this Bill is more important than ever given the continuing increase in the proportion of very old people in the community.

Link to the Department’s aims and objectives

1. The Department is fully committed and focused on developing and delivering strategies that will ensure patients and users of health and social care services receive a service of quality and one that is safe
2. To achieve this the Department has set seven strategic objectives for 2021-22.
3. Of those objectives, given that the draft Bill is on the Government’s legislative programme and its fundamental purpose is to better safeguard vulnerable members of the Island’s community, namely those lacking mental capacity, the objectives with which this Bill strategically aligns:
 - i. development of a five year modern, comprehensive legislative programme;
 - ii. assurance of service delivery in terms of quality, safety [...] and appropriateness for the service user;
 - iii. developing [...] the health and care system long-term strategic plan.

Responsible Departmental Member(s)

Ms. August-Hanson, MLC.

Ministerial sign off

I have read the Impact Assessment and I am satisfied that the balance between the benefit and any costs is the right one in the circumstances.

Signed by the Minister

Date:

SUMMARY: ANALYSIS AND EVIDENCE

IMPACT OF PROPOSAL

Resource Issues - Financial (including manpower)

See below.

Statement

1. The introduction of the Capacity Bill would not be cost neutral. Additional resource will be required by Manx Care to undertake assessments of capacity and to develop training for staff. Additional resource may also be required by the General Registry and the Department.

Likely Financial Costs

Publicity, Awareness/Education - £3,000

1. One of the criticisms of the MCA 2005 in the UK has been that staff across the UK Government, the private and third sectors and the general public were unaware of the legislation and its effect. Therefore, alongside an initial publicity campaign, the Department and Manx Care will need to ensure there is adequate resource to provide support in relation to answering queries, producing guidance and supporting other sectors.
2. The Capacity Bill will require the delivery of structured capacity awareness training and accredited Best Interest Assessor training for relevant persons.
3. A tiered approach to training will be developed, namely:-
 - a) Tier 1: General Awareness IOM Capacity Act: e-learn vannin module to be developed in-house.

- b) Tier 2: Capacity Practical Training for a wider appreciation of the new requirements.
- c) Tier 3: Best Interest Assessor training.

4. Tier 2:

- a) Capacity Practical Training: Online Initial/Refresher Training - £35,500 to £60,000 over 2 year period depending on the choice of delivery and extent of the training required (circa 350 people/2 years).
- b) This would be required as a one-off cost for key staff working with people who may lack capacity. There is already an awareness training programme based on common law principles being run by the Department. 350 staff have been trained and it is estimated 350 more will need to be.
- c) Example costs are: £2533 per full day session for 25 staff members and 14 sessions over two years would be required initially to get all the Department/Manx Care staff trained. Or online training £175 per person for generic capacity practical application training. This training should form part of the ongoing mandatory training for individuals.

5. Tier 3:

- a) **Best Interest Assessor – formal training (may be developed in-house in due course)**
- b) £1,350 per person. Aimed at registered health and social care professionals, e.g. nurses, social workers and occupational therapists.

Likely Financial Benefits

- 1. Cost avoidance of potential legal challenges due to the current lack of legal procedure for people who may lack capacity.

If the proposal introduces provisions that will require another Department, Board, Office or Body to take on additional work or responsibility please ensure that they have been consulted with early on in your considerations. Please provide a brief statement as to who they are and the consultation that has taken place.

- 1. It is anticipated that the Bill, particularly with regard to the introduction of Lasting Powers of Attorney, will impact on Manx Care and the Courts (particularly the General Registry). With regards the development of policy, the Department ran a policy working group that included representatives of both Manx Care and the General Registry.

2. Amongst others, both Manx Care and the Courts, as a part of the public consultations on policy principles and the draft Bill, were directly consulted.
3. The Department has discussed the changes with Manx Care, the General Registry and the Attorney General's Chambers. The Department will assist with any questions that arise while procedures are being updated.

Are there any costs or benefits that are not financial i.e. social

1. The Department considers that there are considerable social benefits, being:

a) Protecting the Vulnerable

One of the Government's priorities is to protect those individuals in our society who are vulnerable. Those who lack the mental capacity to make decisions are amongst some of the most vulnerable in our society. As other people are taking decisions on their behalf without a clear legal framework they are at risk of abuse financially, mentally and potentially physically.

b) Productivity Improvements

Currently staff across Manx Care operate using best practice under common law. This can be time consuming and often involves input from more senior staff to safeguard those making decisions. The introduction of a clear legal framework will allow for more streamlined decision making leading to potential productivity improvements.

c) The Island's Ageing Population

Changing demographics mean that without new legislation increasing numbers of vulnerable people will be unprotected by law.

The demographic features of the Isle of Man replicate those of neighbouring jurisdictions in the marked increase of older people. Research has shown that within this ageing population dementia is projected to rise significantly. The incidence of those lacking capacity increases as people get older. In addition advances in health care mean not only that people are likely to live longer, but also with illnesses and disabilities which previously would have led to the person's death. Capacity legislation would introduce a clear statutory framework to empower and protect people in this group who lose capacity to make

decisions for themselves. It would also allow individuals to plan ahead in respect of decisions about care and treatment options should they lose capacity at a future point.

Governance and challenge

The introduction of a comprehensive legal framework will address the potential risk of legal challenge principally with regard to the making of decisions on behalf of individuals who lack capacity by health and welfare professionals and medical professionals.

Which Business sectors/organisations will be impacted, if any, and has any direct consultation taken place?

1. The proposed legislation will affect health and social care professionals who look after people who lack the capacity to make decisions for themselves. This not only includes public services but also services provided by the private and voluntary sectors.
2. Bodies and members of various professions who work with vulnerable people were, as a part of the two public consultations directly consulted. By way of example the Department directly consulted with:
 - a) the Safeguarding Board;
 - b) the Social Affairs and Policy Review Committee;
 - c) the Social Policy and Childrens Committee;
 - d) the Care Quality and Safety Committee;
 - e) the Mental Health Commission;
 - f) United Response;
 - g) Housing Matters, Isle of Man;
 - h) The Isle of Man Council of Voluntary Organisations;
 - i) Hospice Care;
 - j) Isle of Man Law Society.

We found their feedback invaluable in shaping the work on the Bill.

Does the proposal comply with privacy law? Please provide a brief statement as to any issue of privacy or security of personal information.

The Bill will interact with privacy laws, as new registers will be created of Lasting Powers of Attorney for property and financial affairs and health and welfare. These will be held at the General Registry. However, we expect the impact to be minimal as the General Registry already complies with privacy laws while holding and maintaining the existing register of Enduring Powers of Attorney.

Has Treasury Concurrence been given for the preferred option

1. In accordance with financial direction B 6.2 of the Government's Financial Regulations, the Department submitted a paper together with the Bill (Volume 7) and the Impact Assessment (version 6) to the Treasury for their meeting on 30 March 2022.
2. Section 10 of the Treasury Act 1985 and financial direction B 6.2 of the regulations, requires every Bill, except one which will have no effect on public revenue, expenditure or personnel, to be submitted to the Treasury for approval before it is submitted to the Council of Ministers for authority for its introduction in the Legislature.
3. At that meeting on 30 March 2022 Treasury concurred to the Capacity Bill 2022 being introduced into the Legislature in accordance with section 10 of the Treasury Act 1985 and financial direction B6.2.

Key Assumptions / Sensitivities / Risks

The Bill is cross-Government and requires other Departments to implement measures which have a resource impact.

Approximate date for legislation to be implemented if known

Subject to the passage of the Bill through the Legislature, the Department anticipates the draft Bill receiving Royal Assent in or around January/ February 2023. Subject to that the Bill comes into operation on such day or days as the Department may by order appoint. The Department notes that for the Bill to become operable a Code of Practice will be required together with secondary legislation.