

Capacity and Self Determination (Jersey) Law 2016: An Overview

Legislation Project Team

Human Rights (Jersey) Law 2000:

Jersey and the ECHR



Human Rights



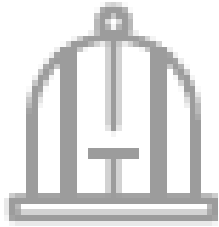
Human Rights (Jersey) Law 2000



- convention (ECHR) since 1953
- law since 10 December 2006
- enforceable against a 'public authority' carrying out a public function
- decided in the Royal Court
- appeal to European Court of Human Rights (ECtHR)

ECHR and Self-Determination

Any interference must be in accordance with a procedure prescribed by law



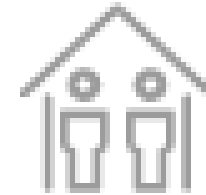
Article 5

Everyone has the right to liberty and security of person



Article 6

Everyone has the right to a fair hearing within a reasonable time by an independent and impartial tribunal



Article 8

Everyone has the right to respect for his private and family life, his home and his correspondence

Capacity and Self-Determination (Jersey) Law 2016: CSDL



Capacity and Self-Determination Law



- CSDL affects all people aged 16 and over
- CSDL supports people's decision-making, including future decisions about care or treatment and appointing others to make decisions on their behalf
- CSDL ensures human rights are at the forefront of care and treatment, also establishes additional safeguards for people who lack capacity
- CSDL provides a legal framework for assessing capacity and making specific decisions at specific times for those who lack capacity to make the decision

CSDL contents



- Guiding principles and best interests
- Lasting Powers of Attorney (LPA)
- Advance Decisions to Refuse Treatment (ADRT)
- Delegates and powers of the Court
- Capacity and liberty
- Independent Capacity Advocates
- Crime of wilful neglect

CSDL Code of Practice



Capacity and Self-Determination (Jersey) Law 2016
Code of Practice

Contents

Contents

Introduction

Executive Summary

Glossary	1
----------	---

Section 1: Using the Law

Chapter 1	Principles of the Capacity and Self-Determination Law	8
Chapter 2	Capacity	16
Chapter 3	Best interests	32
Chapter 4	Excluded decisions	43
Chapter 5	Care and treatment	46
Chapter 6	Restraint	55
Chapter 7	Using a person's money	59

Section 2: Future decision-making

Chapter 8	Lasting Powers of Attorney	64
Chapter 9	Advance Decisions to Refuse Treatment	77
Chapter 10	Delegates and the role of the Royal Court	88

Section 3: Capacity and liberty

Chapter 11	Significant Restrictions on Liberty	103
------------	-------------------------------------	-----

Section 4: Safeguards under the Law

Chapter 12	Independent Capacity Advocates	121
Chapter 13	The Capacity Law Review Tribunal	132
Chapter 14	Consent, coercion and wilful neglect	136

Section 5: Other matters

Chapter 15	The Mental Health (Jersey) Law 2016	142
Chapter 16	Research	153

Part 1:

Principles



Core Principles of CSDL



1. a person, aged 16 and over, must be assumed to have capacity, unless it is shown that the person lacks capacity in relation to the decision
2. a person is not to be treated as unable to make a decision unless all practicable steps to enable that person to make the decision have been taken without success
3. a person is not to be treated as unable to make a decision merely because the person makes an unwise decision

Core Principles of CSDL cont'd



4. an act done, or a decision made, on behalf of a person lacking capacity must be done or made in the person's best interests
5. before an act is done, or a decision is made which is restrictive of the person's rights and freedom of action, regard must be had to whether the purpose for the which it is needed can be achieved as effectively in a less restrictive way

The five core principles summarised



1. assumption of capacity
2. practicable steps
3. unwise decisions
4. best interests
5. less restrictive way

Autonomy



“There is a space between an unwise decision and one which an individual does not have the [mental] capacity to take and it is important to respect that space, and to ensure that it is preserved for it is in that space that an individual’s autonomy operates.”

PC & NC v City of York Council 2013

Using the CSDL



1. assumption of capacity
2. all practicable steps to help someone to make their own decision
3. allow (sometimes extremely uncomfortable) unwise decisions

autonomy <> lack of capacity

4. best interests
5. less restrictive way

Ability to make a decision



1. Can the person understand the information relevant to the decision?
2. Is the person able to retain the information for long enough to make the decision?
3. Can the person use or weigh the information in making the decision?
4. Can the person communicate their decision by any means?

If there is difficulty in any of these areas then there may be a lack of capacity to make the decision

Assessing capacity



The CSDL provides a single capacity test:

a person is unable to make the particular decision at the time it needs to be made; **because**

they have an impairment of the mind or brain or some other disturbance in the way their mind or brain works that is affecting the decision-making

Capacity is decision and time specific

Impairment or disturbance



- Provide evidence the person has an impairment of the mind or brain
- Must show the impairment renders the person unable to make the decision – it is not enough for an impairment simply to be present
- If no impairment the person will not lack capacity under the CSDL

Remember the person has to prove nothing

'Cloak of legal protection'



Before doing the act a person has taken reasonable steps to establish whether P lacks capacity in relation to the matter in question

Best interests



- CSDL does not define best interests – this is deliberate
- Best interests is different for everybody as each person's life and circumstances are unique
- CSDL gives guidance on what should be considered when thinking about a person's best interests
- The best interests decision-maker varies depending on the decision

Best interests decision-making



- Decision-makers cannot discriminate or make assumptions about a person based on their age, appearance or behaviours
- Decision-makers must do everything they can to support a person to make their own decision and participate in decision-making
- Decision-makers should take into account the views of:
 - the individual
 - any relevant attorney
 - any relevant delegate
 - any other relevant people

Best interests decision-making



Decision-makers must also consider:

- is it likely the person will regain capacity and can the decision be delayed until then
- the person's past and present wishes and feelings, including any relevant written statements made before they lost capacity
- the beliefs and values that would be likely to influence the person's decision; and
- any other factors that the person would be likely to consider if they were able to do so

Decisions must always be reviewed against the less restrictive principle

'Cloak of legal protection' - revisited



When doing the act a person reasonably believes that P lacks capacity in relation to the matter in question and it will be in P's best interests for the act to be done

Part 1:

Permitted acts and liability

Permitted acts in connection with care and treatment



Article 8 of the CSDL:

‘before doing the act, C has taken reasonable steps to establish whether P lacks capacity in relation to the matter in question; and

when doing the act C reasonably believes that P lacks capacity in relation to the matter in question, and it will be in P’s best interests for the act to be done’

C’s liability is as if P had capacity to give consent and had done so

Impact of CSDL Article 8



- Decision-makers must participate in best interests
- No experts in capacity – but assistance can be requested
- Capacity assessments ‘stand’ if correct process followed
- Capacity assessments are ‘an art not a science’
- Capacity is a conversation

Part 1:

Restraint



Restraint

Restraint is the use, or threat of force, to secure the doing of a resisted act or treatment which restricts the person's liberty of movement



Article 9 of the Law:

- Restraint is not a permitted act unless it is necessary to do so to prevent harm
- Use of restraint must be a proportionate response to:
 - the likelihood of P's suffering harm, and
 - the seriousness of that harm
- Restraint cannot conflict with a valid legal decision-maker
- CSDL is not to be used to prevent harm to others

Some ongoing restraint can be authorised through a legal process

Part 2:

Lasting Powers of Attorney



Lasting Power of Attorney (LPA)



- There are two types of LPA:
 - health and welfare – this would include making decisions such as daily routines, medical care or moving into a care home
 - property and affairs – this would include making decisions such as paying bills, banking or selling assets
- A person can choose to make one or both types once they are 18 years old. LPA's can be updated, amended or cancelled at any time if a person has capacity
- A property and affairs LPA can be used immediately, but a health and welfare LPA only applies when a person lacks capacity to make a decision

An LPA must be witnessed by a professional and registered with the Judicial Greffe to make it a statutory instrument

Attorneys



- At least 18 years old and agree to the role
- Only you can choose attorneys and decide what they can (or can't) do
- Attorneys must follow CSDL and best interests when making the decision on your behalf
- Attorneys decisions are as valid as if you had made them
- Various options for decision-making
- Selling property and 'life-sustaining treatment'
- Buyer beware – add limits or seek help if unsure

Attorneys and the CSDL



- Someone who is subject to a declaration of bankruptcy cannot be an attorney for property and affairs - they can be an attorney for health and welfare
- Once appointed, an attorney cannot give up their role without notifying you and the Judicial Greffe
- In relation to LPA's the Court can:
 - decide any questions of validity
 - interpret any unclear meaning
 - request reports in some circumstances
 - remove unfit attorneys



- Completed online by you or your ‘agent’
- Cost £25 or £10
- Initially ‘wet’ signatures via printed format
- Manual verification by Judicial Greffe’s office
- LPA ‘issued’ once verification or notification period is complete
- Externally searchable planned to verify LPA is current version
- System planning is to adapt to electronic verification & Citizen’s Portal

Part 3:

Advance Decisions to Refuse Treatment

Advance Decisions to Refuse Treatment (ADRT)



- ADRT allows you to record specific medical treatments that you do not want to be given in the future, for when you might lack capacity to make or communicate the decision
- Will only be used when you lack capacity to make the decision
- ADRT can be used to refuse life-sustaining treatment in specific circumstances - this must have a witnessed statement acknowledging the decision should apply to treatment 'even if my life is at risk'
- ADRT can be changed or withdrawn at any time if you have capacity
- Can be affected by an LPA for health and welfare

ADRT



- Might not be applied in ‘unanticipated circumstances’ such as a new treatment options
- The Court can decide if an ADRT:
 - exists
 - is valid
 - applicable to the treatment
- You cannot use an ADRT to:
 - request or insist upon particular treatments
 - ask for anything illegal, such as assistance to end your life
 - refuse care that meets essential needs
 - appoint someone to make decisions on your behalf

Part 4:

Delegates

Delegates



- Some people might lose capacity and not have made an LPA
- The Court can make decisions or appoint someone as a delegate to make decisions
- Delegates can be appointed for health and welfare and/or property and affairs
- Delegate's decision-making scope and timeframe is set by the Court
- The Viscount holds regulatory responsibility

Curatorship is gone

Part 5:

Capacity and liberty

Capacity and liberty



- There are times when a person's care results in ongoing restrictions on their EHRC A5 (right to liberty) to keep them safe
- If these are a significant restriction on liberty they must be legally authorised
- An independent assessment will ensure that the care is in the person's best interests and limits their rights and freedom of action as little as possible

Significant Restrictions



- P is not allowed to leave unaccompanied
- P is unable to leave the relevant place unassisted (by reason of P's physical impairment or mental disorder) and reasonable, practicable assistance for this purpose is not provided
- P's actions are so controlled in the relevant place as to limit P's access to part only of that place
- P's actions are controlled, whether or not in the relevant place, by the application of physical force or of restraint
- P is subject to continuous supervision
- P's social contact with persons other than those caring for him or her in the relevant place, is restricted

Parts 6 & 7:

Additional safeguards

Additional safeguards



Independent Capacity Advocates (ICA):

- available for people who do not have significant others to support them with certain decisions

Wilful neglect and ill-treatment is a new offence that applies to the treatment of people:

- in care homes
- provided with home care
- in supported living arrangements

A person found guilty of wilful neglect can be imprisoned for 5 years and given a fine

Please evaluate:

<https://survey.gov.je/s/CSDLCPBI>

Further information available from:

www.gov.je/capacitylaw