

**THE STATES OF DELIBERATION**  
**of the**  
**ISLAND OF GUERNSEY**

**COMMITTEE FOR HEALTH & SOCIAL CARE**

**‘CAPACITY LAW’ - SUPPLEMENTARY POLICY MATTERS AND POTENTIAL FINANCIAL  
IMPLICATIONS ARISING FROM THE APPEALS PROCESS**

The States are asked to decide:-

Whether, after consideration of the Policy Letter entitled “Capacity Law’ – Supplementary Policy matters and potential financial implications arising from the appeals process’, dated 20<sup>th</sup> January, 2020 they are of the opinion:-

1. To agree the supplementary matters of policy as described in section 3 of this Policy Letter and direct that the Projet de Loi entitled “The Capacity (Bailiwick of Guernsey) Law, 2020” is drafted accordingly.
2. To agree that legal representation at Mental Health and Capacity Review Tribunal hearings (primarily in relation to protective authorisations) is to be provided under the Legal Aid Scheme generally on a ‘*no means, no merits test*’ basis; whilst reserving the right for the Legal Aid Administrator to exceptionally apply a ‘*means test*’ to an application, where reasonable and in conformity with human rights obligations.
3. To agree that legal representation for appeals from a Mental Health and Capacity Review Tribunal to the Royal Court or Court of Appeal may be provided under the Legal Aid Scheme on a ‘*means and merit test*’ basis.
4. To note that, upon enactment of “The Capacity (Bailiwick of Guernsey) Law, 2020”, there are anticipated to be additional ongoing funding requirements of:
  - i. £25,000 per annum for the Guernsey Legal Aid Service; and
  - ii. £75,000 per annum for the future Mental Health and Capacity Review Tribunal

and that requests for additional budget will be submitted as part of the annual budget process.

5. To direct the Committee *for* Health & Social Care to report back to the States with proposals for the introduction of an advocacy service.

The above Propositions have been submitted to Her Majesty's Procureur for advice on any legal or constitutional implications in accordance with Rule 4(1) of the Rules of Procedure of the States of Deliberation and their Committees.

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**COMMITTEE *FOR* HEALTH & SOCIAL CARE**

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IMPLICATIONS ARISING FROM THE APPEALS PROCESS**

The Presiding Officer  
States of Guernsey  
Royal Court House  
St Peter Port

20<sup>th</sup> January, 2020

Dear Sir

**1. Executive Summary**

- 1.1 In March 2016<sup>1</sup>, the States of Deliberation approved proposals by the then Health and Social Services Department (HSSD) to introduce a new legal framework to empower individuals who may lack capacity to make their own decisions where possible, to allow them to plan for the future and, if they lack capacity, to ensure that decisions made on their behalf respect their basic rights and freedoms.
- 1.2 The Capacity Law is an important part of the Disability & Inclusion Strategy and has been the Committee’s top legislative priority of the political term.
- 1.3 The 2016 Policy Letter and the Resolutions agreed by the States set out the general policy intentions of the law, which has provided the framework for legislative drafting.
- 1.4 During the drafting process, some changes have been made to the recommendations which were originally approved on the basis of the 2016 Policy Letter and some related additions have also been made. This Policy Letter asks the States to consider and approve these minor variations and supplementary matters.

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<sup>1</sup> Health & Social Services Department - “Capacity Law” - [Article III of Vol. II of Billet d’État VII of 2016](#)

- 1.5 This Policy Letter also addresses an outstanding States Resolution<sup>2</sup> to report back on the potential financial implications for the Guernsey Legal Aid Service (GLAS) arising from the appeals process. It describes how the number of expected appeal cases have been estimated, the impact of this on the workload of the Mental Health Review Tribunal (MHRT) and the anticipated associated costs.
- 1.6 The resource implications arising from the introduction of the legislation are also described (Section 5).
- 1.7 Subject to any amendments being required to the draft legislation following consideration of this Policy Letter, it is expected that the Capacity (Bailiwick of Guernsey) Law will be submitted to the Assembly for approval during this political term.

### ***An overview of the Capacity Law***

- 1.8 The Capacity Law has been developed with the principal purpose of empowering people to make decisions for themselves wherever possible.
- 1.9 Careful consideration has been given to ensure that the new provisions that will be introduced by the legislation are those that would most effectively assist and protect members of the community in the Bailiwick, in a proportionate way, whilst being sufficiently robust and respectful of the human rights of those who lack capacity.
- 1.10 In summary, it is proposed that the Capacity (Bailiwick of Guernsey) Law will:
- Set out a statutory test to decide whether a person has the mental capacity to make a specific decision;
  - Establish the best interests principle in relation to decision making on behalf of persons who have been assessed to lack capacity;
  - Describe the powers of, and applications to, the Royal Court and Mental Health and Capacity Review Tribunal;
  - Introduce Lasting Powers of Attorney, which permit a person to nominate one or more people to act on their behalf when that person has lost capacity in relation to property and financial affairs and/or health and welfare matters;
  - Introduce Advance Planning to include Advanced Decisions to Refuse Treatment and Advance Care Plans;
  - Introduce Independent Capacity Representatives to provide advocacy support to those who lack capacity and who do not have family or friends who can provide support; and

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<sup>2</sup> Resolution 4 of [Article III of Vol. II of Billet d'État VII of 2016](#)

- Introduce a Protective Authorisation Scheme to authorise the accommodation of people who lack capacity in appropriate care settings, in compliance with Article 5 of the European Convention on Human Rights. This includes the introduction of the role of Capacity Professional to oversee the authorisation process.
- 1.11 Where the policy approach has been further developed since the States instruction in 2016, detailed consideration of the above matters is set out in Section 3 of this Policy Letter.
  - 1.12 The drafting of the Law has been informed by the provisions of the Mental Capacity Act 2005 (the 2005 Act) enacted in England and Wales. More recently, the Committee has considered the recommendations of the Law Commission of England and Wales in relation to the reform of Deprivation of Liberty Safeguards (DoLS), in addition to the relevant decisions of the United Kingdom Supreme Court and the amendments made by the Mental Capacity (Amendment) Act 2019 in shaping the *Projet de Loi*.
  - 1.13 In August 2019, the Committee *for Health & Social Care* (the Committee) carried out some targeted engagement on an initial draft of the legislation. Further information about this is provided in Section 6. This allowed the Committee, at an early stage, to seek feedback on the practical application of some of the provisions within the draft Law for those in the community who will have operational responsibility for the relevant issues arising from the legislation. This included representatives from the Third Sector, residential and nursing care homes, the Guernsey Bar, General Practitioners and other health and social care professionals. The Judiciary has also been consulted.
  - 1.14 The Committee is grateful for the valuable feedback that was received, which has informed the drafting of the Law.
  - 1.15 The Committee has also discussed the proposed legislation with the States of Alderney and the Government of Sark and both Islands have confirmed that they are in agreement for the legislation to be a Bailiwick-wide Law.

***Potential financial implications for Legal Aid***

- 1.16 One of the outstanding Resolutions from the March 2016 Policy Letter (Resolution 4) is for the Committee to report to the States on the potential implications for the Legal Aid budget arising from the provisions introduced by the Capacity Law.
- 1.17 The Capacity Law establishes an appeals mechanism for decisions made under the Protective Authorisation Scheme to the MHRT. The Committee recommends

that the Legal Aid assistance that should be afforded to those wishing to appeal a decision made under the Protective Authorisation Scheme should mirror the arrangements that have been established following the introduction of the Mental Health (Bailiwick of Guernsey) Law, 2010<sup>3</sup> (the 2010 Law). It was previously agreed by the States, in order to respect human rights requirements, to extend Legal Aid to those appealing against compulsory and other related decisions under the 2010 Law.

- 1.18 It is proposed that the Tribunal be renamed the Mental Health and Capacity Review Tribunal (MHCRT) to take account of the expanded remit to hear appeals bought forward under the Capacity Law. This has been discussed with existing Tribunal Members and their support staff.
- 1.19 As a result, it is expected that there will be an increased caseload for the MHCRT, which will have direct financial implications for the costs associated with convening the Tribunal to hear an increased number of appeals. This will also impact on the GLAS as a greater number of appeals cases would be eligible for Legal Aid to ensure that appropriate legal representation is available to them at a Tribunal hearing.
- 1.20 This Policy Letter recommends that Legal Aid should be available for appeals bought forward under the framework of the Capacity Law (Proposition 2), but that Legal Aid assistance should not be available for subsequent appeals to the Royal Court (Proposition 3).
- 1.21 In line with the arrangements in place for appeals bought forward under the Mental Health Law, 2010, it is also recommended that a right should be reserved for the Legal Aid Administrator to exceptionally apply a '*means test*' to an application, where reasonable and in conformity with human rights obligations<sup>4</sup>.
- 1.22 It is expected that the additional revenue expenditure required to cater for an additional 12-15 appeal cases estimated each year will be in the region of £25,000 to provide Legal Aid to support such appeals. To convene the Tribunal on an increased number of occasions is expected to cost an additional sum in the region of £75,000 per annum. Detailed explanation is provided in Section 4.
- 1.23 The Committee considers that it would be challenging to subsume the expected additional cost for the Tribunal within its existing General Revenue budget allocation and therefore additional budget to enable the MHRT to administer and

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<sup>3</sup> The Policy & Resources Committee – “Guernsey Legal Aid Service – Legal Aid Funding of Mental Health Review Tribunals and Public Law Cases” – [Billet d’État IV of 2013](#)

<sup>4</sup> Although a right has been reserved to apply a means and merits test, this has not been applied to date and all appeals to the MHRT have received Legal Aid.

convene to hear these additional appeals and to provide Legal Aid will be requested as part of the annual budget process.

### ***Resourcing the implementation of the legislation***

- 1.24 The 2016 Policy Letter highlighted that the greatest resource implications arising from the new Law would fall to the Committee. The former HSSD made a commitment that it planned to absorb the Department's cost of implementation within its existing budget. Indeed, it is expected that the new processes arising from the Law will be absorbed into 'business as usual' within Health & Social Care over time, and there is a good level of understanding across the organisation of the requirements of the legislation from the consultation.
- 1.25 Whilst the Committee aims to uphold this earlier commitment and will make every effort to introduce the changes to comply with the Law as far as possible without additional resources, it also recognises the Law's importance and the need to be sufficiently prepared when it comes into force.
- 1.26 It will therefore keep under review any additional resource requirements and, if necessary, the Committee will request one-off funding from the Budget Reserve in order to adequately resource the implementation of the legislation. Further detail is provided in Section 5 of this Policy Letter.

## **2. Introduction and Background**

- 2.1 In March 2016, the States of Deliberation approved proposals by the Health and Social Services Department to introduce a new legal framework to empower individuals who may lack capacity to make their own decisions where possible, to allow them to plan for the future and, if they lack capacity, to ensure that decisions made on their behalf respect their basic rights and freedoms. The 2016 Policy Letter set out the general policy intentions of the law, which has provided the framework for legislative drafting.
- 2.2 The drafting of the Law has progressed on the basis of the following collection of principles, which reflect the approach of section 1 of the 2005 Act. These principles are:
- a person must be assumed to have capacity unless it is established that they lack capacity;
  - a person is not to be treated as unable to make a decision unless all practicable steps to help them to do so have been taken without success;
  - a person is not to be treated as unable to make a decision merely because they make an unwise decision;

- an act done, or decision made, under this legislation for or on behalf of a person who lacks capacity must be done, or made, in their best interests; and
- before the act is done, or the decision is made, regard must be had to whether the purpose for which it is needed can be as effectively achieved in a way that is less restrictive of the person's rights and freedom of action.

2.3 The Law has been developed with the principal purpose of empowering people to make decisions for themselves wherever possible. At the highest level, the Law provides a framework for:

- (i) dealing with issues relating to mental capacity for an individual who has lost capacity, including establishing appropriate safeguards to protect their interests; and
- (ii) enabling individuals to plan ahead for a time when they may no longer have capacity to make decisions for themselves, to enable them to register their wishes in advance.

2.4 The 2016 Policy Letter highlighted that the Capacity Law would address the current shortfall of legislative provision for those vulnerable people within the Bailiwick who require assistance to make decisions in their own best interests, but who do not fall within the remit of the 2010 Law.

2.5 Careful consideration has been given during the drafting to ensure that the new provisions effectively assist and protect members of the community in the Bailiwick, in a proportionate way, whilst being sufficiently robust and respectful of the human rights of those who lack capacity.

### **3. Supplementary matters for consideration**

3.1 This section provides a summary of the key provisions within the Law and cross refers to the policy instruction from the States in March 2016. It provides further information about a small number of supplementary matters that have developed as the drafting of the legislation has progressed, in terms of fulfilling the original States instruction for the preparation of the law. These areas are as follows:

- (i) Lasting Powers of Attorney;
- (ii) Advance Care Plans;
- (iii) Representation;
- (iv) Protective Authorisation;
- (v) Role of the Mental Health and Capacity Review Tribunal; and
- (vi) Safeguarding.



**i) Lasting Powers of Attorney**

- 3.2 The 2016 Policy Letter (paragraphs 4.3.1 to 4.3.13) set out the Committee's proposals in relation to lasting powers of attorney (LPAs). LPAs will allow an individual (the grantor) to plan ahead for a time when they may no longer have capacity, by appointing another person as the "attorney" to make decisions on their behalf.
- 3.3 In order to make a valid LPA, the grantor would need to have capacity to make the decision to appoint an attorney when the appointment is made. This will provide the attorney with the delegated power to make decisions in line with the beliefs and wishes of the grantor, if and when the grantor no longer has capacity to do so for themselves.
- 3.4 The Projet de Loi has been drafted to allow for two different types of LPA, which will confer power of attorney in relation to health and welfare matters, and in relation to property and financial affairs.
- 3.5 Taking into account the propositions agreed by the States in 2016, the Committee has considered how best to introduce the process for making and using LPAs. It has taken into account the mixed feedback received during the period of engagement, in particular in relation to the proposed registration process for LPAs. Differences in views were expressed about the extent to which a formal registration process is necessary and whether the same process should be embedded for health and care matters as for financial and property affairs.
- 3.6 Rather than enshrining this process in primary legislation, the Committee has decided that certain provisions regarding LPAs should remain within the Law, but the process itself should be set out in an Ordinance made under the Law. This will allow the Committee to monitor the making and use of LPAs and to amend the process relatively quickly, if it considers this to be necessary over time.
- 3.7 The Ordinance will be drafted on the basis of a proposed registration system for LPAs through Her Majesty's Greffier, who would establish and maintain a register of LPAs. Subject to any amendments, the Ordinance will be brought back to the States in due course when the Law has been enacted.

**ii) Advance Care Plans**

- 3.8 The Capacity Law also includes provisions for an Advance Care Plan (ACP). This is a formal document that will enable a person (P) to set out their future wishes regarding their care, in advance of a time when they may lose the mental capacity to make their own decision. An ACP should be considered by those making decisions about P's care, after they have lost the capacity to make that specific decision.

- 3.9 An ACP can only cover the decisions that P could make if they still had capacity. For example, an ACP cannot require that a person can only be accommodated in a specific care setting, as this may not be available at the time when they need such care. It could also be used to express other wishes and preferences not directly related to care, such as food choices, or to express religious or ethical views.
- 3.10 An ACP should always be made in writing to ensure that it is available to decision makers and a copy is provided to P's family members, GP and/or care home manager (where appropriate).

**iii) Representation**

- 3.11 The Capacity Law introduces Independent Capacity Representatives (ICRs) to protect the rights of people who lack capacity in relation to both the Protective Authorisation Scheme and capacity legislation in general. Principally, ICRs would provide representation for a person (P) lacking capacity with no friends or family who are eligible to represent P (i.e. able to act in P's best interests) or able to represent P effectively.
- 3.12 Medical and social care staff will have a duty to request the support of an ICR in the following situations:
- (a) where there is a safeguarding enquiry or another allegation has been made which might affect the eligibility of a family member or friend to act on P's behalf,
  - (b) where it is proposed to provide or withdraw serious medical treatment, which will include treatment which is likely to affect P's life expectancy or significantly affect P's quality of life,
  - (c) where P's accommodation is likely to change for a period of more than 28 days, and
  - (d) where P is or may be subject to a Protective Authorisation but does not have any friends or family who can be consulted or who can act as P's Representative.
- 3.13 However, in all of these cases, there will be a proviso that no such appointment would be required in the case of an emergency (or other necessity) where there would be insufficient time to consult.

- 3.14 An ICR can also be appointed to support P's Representative where P has a family member or friend acting as the Representative but who wishes to have assistance to carry out the role.

**iv) Protective Authorisation**

- 3.15 The 2016 Policy Letter (paragraphs 5.1-5.2.5) set out the Committee's initial proposals in relation to the Bailiwick equivalent of the Deprivation of Liberty Safeguards (DoLS) in force in England and Wales.

- 3.16 As set out in the original Policy Letter, the Committee has considered the recommendations of the Law Commission of England and Wales in relation to the reform of DoLS, in addition to the relevant decisions of the United Kingdom Supreme Court and the amendments made by the Mental Capacity (Amendment) Act 2019.

- 3.17 The Committee has also consulted with stakeholders and representatives of the Third Sector on its proposed equivalent, both in relation to its name and to the processes. The Protective Authorisation Scheme in the proposed Bailiwick Law has therefore been developed to protect the rights of people who lack capacity and whose care requires them to be accommodated in circumstances which might otherwise breach their right to liberty under Article 5 of the European Convention on Human Rights (the ECHR).

- 3.18 The Protective Authorisation Scheme uses the term "significant restriction of a person's personal rights" instead of "deprivation of liberty" as this is not a popular or easily understandable term. A significant restriction occurs when -

- (a) a person (P) is confined in a particular restricted space for a not negligible time,
- (b) P has not validly consented to that confinement, and
- (c) the arrangements which include the confinement are made by, or are due to an action of, a person or body responsible to, or regulated by, an Island authority,

which includes deprivation of liberty within the meaning of Article 5(1), ECHR.

- 3.19 The Protective Authorisation Scheme will apply to all persons aged 16 years and over who are assessed to lack capacity to consent to the arrangements for their care. In addition, it will apply to all settings, including hospitals, care homes, supported accommodation and domestic settings, thereby ensuring that the safeguards afforded by the scheme apply to everyone deprived of their liberty.

- 3.20 A Protective Authorisation should be requested in advance of the arrangements being made, unless there is an emergency, and it is therefore envisaged that for many people, the Protective Authorisation will be granted as part of the process of arranging a care package/placement, where such arrangements would effectively deprive a person of their liberty. A new role of Capacity Professional is also created, who will act as an independent reviewer of cases, as well as assessing certain cases, such as where a person is objecting.
- 3.21 Finally, it is proposed that more straightforward challenges to Protective Authorisations could be dealt with more quickly and informally by the Mental Health and Capacity Review Tribunal (see v) below), although some complex issues might need to go to the Royal Court.
- 3.22 A Representative will be appointed for the period of the Protective Authorisation, who will usually be a family member or friend, but may be an attorney who holds an LPA or a guardian under the customary law. The Committee proposes that the position of individuals who do not have friends or family, or whose friends and family are not capable of acting in that individual's best interests should be protected by the appointment of an Independent Capacity Representative (outlined in iii) above). The Representative, the Independent Capacity Representative or another person who is in regular contact with P must also be consulted in relation to certain decisions.
- 3.23 In guiding the preparation of the Projet de Loi, the Committee has sought to fit the new arrangements around existing structures within the Bailiwick (where possible) and to avoid unnecessary bureaucracy, whilst providing appropriate safeguards.

**v) Role of the Mental Health and Capacity Review Tribunal**

- 3.24 The 2016 Policy Letter recognised the need to ensure that the new legislation would respect relevant human rights obligations. This includes ensuring that there is a right to appeal against any decision made on an individual's behalf that relate to a "significant restriction of a person's personal rights".
- 3.25 It is suggested that the remit of the MHRT should be widened to hear most cases where a person or their Representative objects to the arrangements for their care or more general issues relating to capacity. It is intended that cases can be dealt with more quickly and informally by using a tribunal, rather than the more formal processes of a court. With this in mind, it is proposed for the Tribunal to be renamed the Mental Health and Capacity Review Tribunal (MHCRT).
- 3.26 Section 4 of this Policy Letter explores the potential financial impact for the States of providing Legal Aid to support those wishing to appeal to the MHCRT.

**vi) Safeguarding**

3.27 Whilst drafting the Capacity Law, the Committee also gave consideration to providing clear statutory powers which would permit safeguarding on a more robust basis and protect vulnerable persons aged 18 and over. To that end, the Committee has included an enabling power in the Law which would allow:

- (a) the institution of safeguarding enquiries and safeguarding vulnerable persons reviews,
- (b) the establishment of a body to help and protect vulnerable persons in the Bailiwick or any part thereof,
- (c) the disclosure, and sharing, of information for the purposes of safeguarding vulnerable persons, and
- (d) specified persons to enter premises and require the provision of information or the production of documents where necessary for any safeguarding enquiry or safeguarding vulnerable persons review.

3.28 Although the matter of safeguarding was not included within the scope of the 2016 Policy Letter, the need to establish more robust measures for adult safeguarding has been set out by the Committee as part of the Policy & Resource Plan on a number of occasions, in particular, in relation to the 'Regulatory and Support Policy' Priority Area<sup>5</sup>.

3.29 For example, in the Committee's most recent submission approved by the States in June 2019, the CfHCS highlighted that it would be considering ways to introduce, in statute, an Adult Safeguarding Board to facilitate multi-agency strategic oversight of adult safeguarding risk on the Island. The provisions drafted within the Capacity Law will go some way to supporting this objective.

3.30 However, in order to provide further clarity on how the supporting Ordinance would be developed in policy terms, a separate Policy Letter will be prepared in due course to describe how these provisions would be fulfilled at an operational level.

**4. Potential financial implications for the MHCRT and Legal Aid**

4.1 In March 2016, the States resolved:

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<sup>5</sup> Policy & Resources Committee – 'Policy & Resource Plan 2018 Review and 2019 Update' – [Billet d'État IX of 2019](#)

“4) To note the potential impact on the Legal Aid budget, and to direct the Committee for Health and Social Care to report to the States on this issue when the implications are clearer and before the legislation is presented to the States of Deliberation for approval.”

- 4.2 The Protective Authorisation Scheme (see iv) above), and the appeals mechanism inherent within the Scheme to the MHCRT, has been identified as the primary area within the framework of the Capacity Law where it is recommended that Legal Aid should be available<sup>6</sup>. The Committee recommends that this is done so on the basis of mirroring the arrangements that have been established following the introduction of the 2010 Law<sup>7</sup>, where the States agreed that Legal Aid should be extended to those appealing against detention and other related decisions in order to respect human rights requirements.
- 4.3 The Committee has discussed this recommendation with the Committee *for* Employment & Social Security (CfESS), which has political oversight for the GLAS. A letter of comment from the CfESS is appended to this Policy Letter (**Appendix 1**).
- 4.4 Paragraphs 4.5 to 4.37 which follow provide further background information to support this recommendation, together with an estimate of the expected number of additional appeal cases to the MHCRT each year and the associated additional financial cost.

#### **Background to the work of the GLAS**

- 4.5 The GLAS provides free or reduced cost legal advice and assistance to people with limited means who could not otherwise afford the cost of an Advocate and is available for criminal and civil matters<sup>8</sup>. The Administrator is an independent statutory official and has full discretion to grant or refuse Legal Aid within the terms of the scheme which the States prescribes. There are three forms of Legal Aid funding:

- **Detention form** – these are used to provide advice and assistance from an Advocate to persons who are detained in police or other lawful custody. All such advice and assistance is provided free of charge to the detainee.

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<sup>6</sup> It is not considered appropriate for Legal Aid to be available to individuals wishing to make applications or otherwise litigate in relation to Lasting Powers of Attorney, which allows their wishes to be recorded in the event that they may lose capacity in the future.

<sup>7</sup> [Billet d'État IV of 2013](#)

<sup>8</sup> “Legal Aid – Frequently asked questions about Legal Aid in the Bailiwick of Guernsey” is available from: <http://guernseyroyalcourt.gg/CHttpHandler.ashx?id=78075&p=0>

- **Green form** – these are issues for preliminary advice and assistance from an Advocate. Applications, are, if appropriate, means tested by the Advocate. ‘Green forms’ provide two hours of advice and assistance but can be extended usually for a further two hours.
- **Full certificate** – these are issued for court cases and for public law appeals cases (such as cases heard by the MHRT). Applications are, if appropriate, means tested by GLAS (based on household income and allowable expenses) and merit tested by the Advocate (based on legal opinion and cost/benefit analysis) but automatically approved if there is a real risk of a custodial sentence in criminal cases.

- 4.6 Whilst eligibility for ‘full certificate’ advice is usually ‘means and merits’ tested, most appeals to the MHRT and in respect of some applications to the court<sup>9</sup> made under the Children’s Law, are provided without an assessment of means due to the human rights issues involved.
- 4.7 In such cases, Legal Aid is usually provided automatically regardless of both the financial circumstances of the applicant and the merits of the case.
- 4.8 It was acknowledged by the States that, irrespective of an individual’s financial circumstances and the strength of their case, there were important legal reasons for ensuring that those detained under the 2010 Law were able to challenge their detention should they wish to do so, and to ensure that there were no barriers to doing so. This is, however, subject to exceptional circumstances which point to the necessity for an applicant to be subject to a means test where this is reasonable and in conformity with Human Rights obligations.

#### **Proposed extension of Legal Aid in relation to the Capacity Law**

- 4.9 As set out above, the proposed Capacity Law will, if approved, introduce new provisions that will establish robust legal safeguards to protect individuals where it is determined (in accordance with the legislation) that they no longer have capacity to make their own decisions.
- 4.10 There is one area – the introduction of the Protective Authorisation Scheme – where it is considered that the principles currently being applied for Legal Aid in respect of the Mental Health Law would equally apply to the Capacity Law. If the Capacity Law is approved, the remit of the MHRT (to become the MHCRT) will be expanded to also hear those cases where an individual, or most likely their Representative, objects to the arrangements for their care to meet this requirement.

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<sup>9</sup> The CYCT does not attract Legal Aid funding unless there are exceptional circumstances.

## **Protective Authorisation Scheme and appeals to the MHCRT**

- 4.11 The Capacity Law will introduce a Protective Authorisation Scheme to authorise the detention of people who lack capacity. This is designed to safeguard the rights of people who lack capacity to consent to the arrangements for their care, which comprise restrictions on their freedom of movement and autonomy, which would amount to a deprivation of their liberty (described as a "serious restriction of a person's personal rights"). As above, the role of Capacity Professional will also be introduced to oversee the authorisation process.
- 4.12 Tables 1 and 2 below set out how it is expected that an individual would access Legal Aid under the proposed Capacity Law for appeals made to the MHCRT.
- 4.13 Table 3 describes a scenario that would not be eligible for Legal Aid.

**Table 1: Example of how Legal Aid may support a person under the Capacity Law to take a challenge to a Protective Authorisation to the MHCRT**

<b>Person's situation</b>	<b>Suggested Legal Aid Provision</b>
i) Mrs A is living in her own home but has been diagnosed with dementia. She is becoming very forgetful and her family are concerned about how she is coping. A social worker visits and assesses Mrs A to lack capacity with regard to her need for assistance. It is agreed in discussion with her family, in her best interests, that she would benefit from carers visiting to help her during the day.	No Legal Aid assistance needed at this stage.
ii) Over the following months, Mrs A becomes increasingly forgetful and refuses help from her carers. She is found wandering in the night without appropriate clothing. Her social worker assesses Mrs A to lack capacity with regard to her accommodation, care and treatment needs as she is not aware of the risks she faces in her own home. A best interests decision is taken to admit Mrs A to a care home.	No Legal Aid assistance needed at this stage.



Person's situation	Suggested Legal Aid Provision
iii) As part of the assessment for Mrs A's admission to the care home, the social worker considers whether she will be subject to a serious restriction of her personal rights, and therefore needs authorisation under the Protective Authorisation Scheme. The assessment concludes that the arrangements for Mrs A's care at the care home will require a Protective Authorisation. The Authorisation is approved by the Capacity Professional.	No Legal Aid assistance needed at this stage.
iv) Mrs A is admitted to the care home but she is clearly not happy staying there and starts asking to go home. Under the Protective Authorisation, her daughter has been named as her Representative. Under the Capacity Law, Mrs A has the right to challenge the Protective Authorisation in the Mental Health and Capacity Review Tribunal, supported by her Representative. Mrs A's daughter (as Representative) contacts a legal representative to discuss whether to make an application to the Tribunal to challenge the deprivation of her mother's liberty.	The legal representative <sup>10</sup> will consider all the relevant documents (Protective Authorisation, mental capacity assessments and care plans), Mrs A's views and those of her Representative <sup>11</sup> . The legal representative agrees that, as Mrs A or their Representative on their behalf is objecting to remaining in the care home, she has the right of legal challenge. Mrs A's case will be eligible for Legal Aid to make this challenge.
v) The MHCRT is scheduled to meet within 28 days. The legal representative ensures that all necessary documents (mental capacity assessments, care plans, Protective Authorisation, statements from Mrs A and/or her Representative) are made available to the Tribunal.	Mrs A's case will be eligible for Legal Aid.

<sup>10</sup> "Legal Representative" refers to Advocate, barrister or solicitor approved by the Guernsey Legal Aid Service to represent people before the Mental Health and Capacity Review Tribunal

<sup>11</sup> An individual or their Representative will receive the support they require from an Advocate to review their case initially with financial assistance from Legal Aid.

Person's situation	Suggested Legal Aid Provision
vi) The MHCRT meets. Mrs A's legal representative attends the Tribunal with Mrs A's Representative (for the Protective Authorisation). There is no requirement for Mrs A to attend the Tribunal. The social worker will be required to provide a report. The Capacity Professional will be required to attend. The purpose of the Tribunal hearing is to consider whether there is a less restrictive option available which could safely and effectively meet Mrs A's needs and what is in her best interests. The Tribunal will consider whether it is necessary for her to remain at the care home.	Mrs A's case will be eligible for Legal Aid for the hearing.
vii) The Tribunal hearing concludes that it is in Mrs A's best interests to stay at the care home. The Protective Authorisation remains in place, as previously granted, although the Tribunal has the right to add or amend any conditions.	The legal representative's role ends once the decision has been delivered to Mrs A.

**Table 2: Example of how Legal Aid may support a Representative, under the Protective Authorisation Scheme, to bring a challenge to the arrangements for the person's (subject of a Protective Authorisation) care**

Person's situation	Suggested Legal Aid Provision
i) Mr B has a severe learning disability and has been admitted to a care home, due to concerns about his behaviour at home and the care provided by his father (as his main carer). The decision was made by his social worker following a best interests meeting, during which his father objected to this decision. Mr B, due to his communication difficulties, was not able to express his views about the care home.	No Legal Aid assistance needed at this stage.

Person's situation	Suggested Legal Aid Provision
<p>ii) As Mr B is subject to a serious restrictions of his personal rights in the care home and, as his father is objecting to these arrangements, a Capacity Professional completes the Capacity, Contrary Decision and Best Interests assessments and oversees the Mental Health and Eligibility assessments. The Protective Authorisation is granted. Mr B's father is named as his son's Representative. Once the Authorisation is granted, Mr B's father is able to apply to the Mental Health and Capacity Review Tribunal to challenge the arrangements for his son's care at the care home. He contacts a legal representative to discuss the current situation with his son.</p>	<p>The legal representative will consider all the relevant documents (mental capacity assessments, Protective Authorisation and care plans), Mr B's views and those of his Representative<sup>12</sup>. The legal representative agrees that, as Mr B is objecting to his son staying in the care home, he has the right of legal challenge. Mr B's father, as Mr B's Representative, will be eligible for Legal Aid to make this challenge.</p>
<p>iii) The Mental Health and Capacity Review Tribunal is scheduled to meet as specified in the Rules of Court. The legal representative ensures that all necessary documents (mental capacity assessments, care plans, Protective Authorisation, statements from Mr B's father) are made available to the Tribunal.</p>	<p>Mr B's case will be eligible for Legal Aid.</p>
<p>iv) The Mental Health and Capacity Review Tribunal meets. Mr B's legal representative attends the Tribunal with Mr B's father and Representative (for the Protective Authorisation). There is no requirement for Mr B to attend the Tribunal. The social worker will be required to provide a report. The Capacity Professional will be required to attend. The purpose of the Tribunal hearing is to consider Mr B's views, whether there is a less restrictive option available which could safely and effectively meet Mr B's needs and what is in his best interests. The Tribunal will consider whether it is necessary for him to remain at the care home.</p>	<p>Mr B's case will be eligible for Legal Aid for the hearing.</p>

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<sup>12</sup> An individual or their Representative will receive the support they require from an Advocate to review their case initially with financial assistance from Legal Aid.

Person's situation	Suggested Legal Aid Provision
v) The Tribunal hearing concludes that it is in Mr B's best interests to stay at the care home. The Protective Authorisation remains in place, as previously granted, although the Tribunal has the right to add or amend any conditions.	The legal representative's role ends once the decision has been delivered to Mr B and his Representative.
vi) Although the Tribunal has ruled that Mr B should remain in the care home, he is showing signs of unhappiness and distress and he is refusing to eat. His father continues to express his unhappiness about his son's continued detention in the care home. He goes to see the legal representative again.	Considering all the facts and the complexity of the situation, the legal representative advises that there are grounds for appeal to the Royal Court. The legal representative prepares the application and represents Mr B's father for the hearing. Legal Aid for this stage of the appeals process is subject to a separate application to the GLAS and to a 'means and merits' test. The legal representative must certify that the merits test is met for financial assistance to be provided.
vii) The Royal Court makes a decision about whether Mr B should remain in the care home. The decision of the Court is final and there is no further route for challenge unless there is a material change in Mr B's circumstances.	Legal Aid for the hearing is available for this stage subject to the 'means and merits' test above being satisfied.

**Table 3: The following situations will not be eligible for Legal Aid**

Person's situation	Legal Aid Provision
i) A person wishes to make a Lasting Power of Attorney	The person may wish to take legal advice but this will not fall under Legal Aid.
ii) An application is made to the Tribunal to resolve an issue regarding a person's capacity to make a particular decision, for example with regard to medical treatment or how best to meet P's needs.	Unless this decision relates to a Protective Authorisation, there is no requirement for legal representation. Legal Aid would not apply.

Person's situation	Legal Aid Provision
iii) Situations where a person is in receipt of a privately funded care package in their own home, but without any States involvement.	Even if they are subject to significant restrictions, unless the States are involved (either in provision of care or due to safeguarding matters) Protective Authorisation will not apply and therefore Legal Aid will not be required.

4.14 The proposals for the Scheme, including the granting of a Protective Authorisation, have been developed to ensure that they are compliant with the right to liberty and security under Article 5 of the European Convention on Human Rights ("the ECHR"), which states:

"5.1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law" and

"5.4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."

4.15 When the Policy Council reported to the States in February 2013<sup>13</sup> with proposals for extending Legal Aid to those individuals appealing to the Tribunal, it was acknowledged that such cases were likely to involve vulnerable people who may not have the ability, for many possible reasons, to represent themselves before the MHRT without legal assistance.

4.16 Where the particular circumstances of a case are such as to lead to the deprivation of a person's liberty, Legal Aid is granted automatically to the applicant, enabling them to have the services of a lawyer, or suitably qualified person, to represent themselves before the Tribunal.

4.17 It was also acknowledged that such proceedings may be complex and would consider potentially wide-ranging issues, including patients challenging expert medical evidence about them. In approving an extension of Legal Aid for such appeals, it was acknowledged that it was vital to ensure that an individual's right to appeal are fully protected and that processes are fully compliant with Article 6 of the ECHR, which enshrines the right to a fair trial. In order to be compliant,

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<sup>13</sup> Policy Council – "Guernsey Legal Aid Service – Legal Aid Funding of Mental Health Review Tribunals and Public Law Children Cases" - [Billet d'État IV of 2013](#)

any person deprived of liberty must be afforded the right to challenge this in court.

- 4.18 In considering an extension of these arrangements to the Capacity Law, and given the likely nature of these cases, it is considered appropriate for the individual's case to be eligible for Legal Aid, acknowledging that this may be dealt with and applied for by an appointed Representative on behalf of the individual who has lost capacity.

#### **The number of Protective Authorisations and appeals**

- 4.19 It has been difficult to determine, in the circumstances set out above, how many Protective Authorisations will be granted and how potential appeal cases will arise when the Capacity Law is introduced. However, understanding the number of Protective Authorisations that are likely to be issued goes some way to helping to determine how many appeals would be made and how many cases would become eligible for Legal Aid.

##### **i) Islanders living in care home settings who lack capacity**

- 4.20 As a starting point for determining the number of people who may require a Protective Authorisation, the number of people receiving care in a registered EMI bed in care homes on the Island was considered as being those most likely to require a Protective Authorisation. There are 155 registered EMI beds. In addition, there are 52 long-term beds on HSC's 'Lighthouse' wards; a further 14 beds in Alderney for patients with needs that may require a Protective Authorisation, and a further 38 people with a learning disability accommodated by HSC in the community. This equates to 259 individuals, which is used as a baseline figure for the number of Protective Authorisations that may be granted.
- 4.21 In England and Wales, it has been determined that of the 181,785 completed applications of Deprivation of Liberty Safeguards made in 2017-2018, the proportion of challenges (appeals) made to the Court of Protection was approximately **2.5% of the cases authorised**.
- 4.22 On this basis, applying a 2.5% appeals rate to the above number of people living in a range of care settings in the Bailiwick, would result in an expectation of the number of appeals of 6-7 cases each year.
- 4.23 Whether these cases will arise every year based on this analysis is difficult to determine, as this will depend on the number of people entering into the care home sector each year. Due to the limited capacity in terms of number of beds available this will, in turn, be reliant on some individuals leaving the sector.

## ii) Islanders living in the community who lack capacity

- 4.24 A Protective Authorisation may also be necessary for Islanders with some health conditions who live in the community. For example, it is estimated that there are approximately 1,250 people living with dementia on the Island.
- 4.25 In England and Wales there are estimated to be 850,000 people living with dementia. Considering the number of Protective Authorisations in England and Wales and extending this analysis to the Bailiwick, suggests that it is likely that about 200 people living with dementia may require a Protective Authorisation and that potentially less than 5 individuals (2.5%) would challenge this.
- 4.26 It is difficult to separate this out from i) above, as some individuals may be living in a care home setting and may have already been taken into account in the above figures.
- 4.27 In addition to the above, there may also be individuals admitted as an inpatient to the Princess Elizabeth Hospital who may also be subject to a Protective Authorisation, which may result in an appeal to the Tribunal. Although data is not readily available to support this view, the number of people admitted to the PEH who would require a Protective Authorisation over and above the numbers already taken into account in (i) and (ii), and who would wish to appeal such an authorisation, are expected to be very low.
- 4.28 It is therefore suggested that, in addition to (i) above, it could be expected that a further 5-8 cases would result in an appeal to the Tribunal.
- 4.29 Whilst it is possible to use the experience in England and Wales as indicative of the number of likely appeals, it is also possible that the recommendation for a less formal appeals route through a Tribunal, rather than a Court, may result in proportionately more appeals coming forward in the Bailiwick.
- 4.30 On this basis and accepting the many assumptions which have been used to arrive at this figure, it is estimated in (i) and (ii) above that in the region of 450-500 Protective Authorisations may be granted each year in the Bailiwick. Assuming that the experience locally mirrors that of England and Wales, using a 2.5% appeals rate, it is estimated that in the region of **12-15 appeal cases** in respect of a Protective Authorisation may become eligible for Legal Aid.

## Financial implications

### *Additional expenditure – Legal Aid*

- 4.31 With respect to the Legal Aid provided to those appealing a decision to the MHRT, an initial allowance of two hours per case is currently available (2019:

£334) and court costs are also met, where relevant. The maximum allowance available is 10 hours per case, at a cost of £167 per hour, which includes the attendance of a legal professional at the Tribunal hearing. This brings the maximum funding available per case to £1,670.

- 4.32 The number of appeals cases to the MHRT, each of which receive Legal Aid, are set out in Table 4 below:

**Table 4: Appeal hearings to the MHRT supported by Legal Aid**

Year	Number of appeal cases to the MHRT
2018	16
2017	20
2016	7

- 4.33 In proposing an extension of Legal Aid to those challenging a Protective Authorisation on the same basis as the appeals to the Mental Health Review Tribunal, for the anticipated maximum 15 cases each year, it is expected that the additional cost to Legal Aid would be in the region of **£25,000 per annum**, calculated at a maximum cost for 10 hours of assistance per case.
- 4.34 For completeness, the Committee has also considered whether it is likely, when LPAs are introduced by the Capacity Law, that there might be an increase in applications made to the Royal Court in relation to life-sustaining treatment decisions, e.g. where there may be a disagreement with medical advice to halt or change such treatment by an individual's representative or appointed guardian. Currently such cases would be dealt with by the Royal Court under the inherent jurisdiction, but these cases are extremely infrequent.
- 4.35 The Capacity Law will introduce the means for individuals to appoint an attorney to act on their behalf by way of a health and welfare LPA. In the circumstances where there was a disagreement in respect of life-sustaining treatment decisions, it would be appropriate for Legal Aid assistance to be available to enable an attorney to take such a case to the Royal Court. However, as the number of cases is extremely low, and as Legal Aid assistance would currently be available in such circumstances, there is expected to be little to no net financial impact of such cases to the GLAS.

***Additional expenditure – MHCRT Tribunal***

- 4.36 In addition to the above, it is also important to note the additional costs associated with the Tribunal function that would arise from an increased caseload. Each case heard by the MHRT currently costs £4,000 - £5,000. This



includes the MHRT Panel's remuneration for preparation and attendance at the hearing, a medical pre-assessment of the patient, together with travel and accommodation costs.

- 4.37 Extending the current arrangements for the MHRT to the Protective Authorisation Scheme for 15 additional cases could be expected to increase Tribunal expenditure by in the region of **£75,000 per annum**.
- 4.38 The Committee *for* Health & Social Care considers that it would be challenging to subsume this additional cost for the Tribunal within its existing General Revenue budget allocation and therefore additional budget to enable the MHRT to administer and convene to hear these additional appeals and to provide Legal Aid will be requested as part of the annual budget process.
- 4.39 The Policy & Resources Committee notes that the MHRT has indicated that these additional cases, based on anticipated numbers, could be accommodated within the current structure, membership and arrangements for the MHRT, for which there is a provisional weekly rota to hear cases as they arise.
- 4.40 Experience from England and Wales suggests increasing numbers over time, as general awareness of the provisions of the Law has increased, which may be mirrored locally. It is also possible that the number of Protective Authorisations, and therefore the associated number of potential appeals and associated costs will increase over time in line with the ageing demographic.
- 4.41 Given the number of assumptions that have been required to calculate the potential number of cases and the associated financial implications for the GLAS, the number of cases each year will be kept under review, to ensure that the impact of these new arrangements are understood fully and can be monitored and reported over time.

## **5. Resourcing the implementation of the Law**

- 5.1 The Capacity Law, upon enactment, will introduce new processes designed to safeguard the interests of individuals who lack capacity. Care has been taken to ensure that the Law offers the necessary safeguards and builds upon the existing processes already in place to manage cases relating to the Mental Health Law, whilst not being overly bureaucratic and unwieldy. Whilst there will be new processes that will need to be adopted by organisations in the community, for example, by residential and nursing care homes, it is expected that the majority of the resource requirements will fall to Health & Social Care.
- 5.2 The 2016 Policy Letter from the former HSSD highlighted that it planned to absorb the costs of implementation of this legislation from within its existing budget. It acknowledged that additional resources would be required to provide

advocacy support; to train Best Interests Assessors (to be known as Capacity Professionals under the Law); for general administration, staff training, and for an implementation Project Manager.

- 5.3 Now the Law has been drafted, the Committee has given further consideration to the resource requirements that may arise.
- 5.4 For example, the Law will introduce the new role of Capacity Professional to oversee the Protective Authorisation process and to act as an independent reviewer of cases, including particularly complex cases, as well as assessing certain cases where there may be an appeal to the MHCRT. It is proposed that social workers, occupational therapists, nurses and psychologists should have the opportunity to train as a Capacity Professional to enhance understanding within the Service and to support completion of the necessary assessments. However, it is likely that one role will be designated as a central point of contact, to oversee cases and to provide advice and supervision.
- 5.5 The Protective Authorisation Scheme will also require a level of general administration, as cases will need to be allocated and resources will also be required to complete the authorisations. This will be an added responsibility for HSC. It is expected that, over time, the processes arising from the legislation will become 'business as usual' within HSC, particularly within the Adult Community Services Team, which includes mental health services, adult disability services and community health and well-being teams.
- 5.6 It may become necessary to recruit some temporary resource to oversee aspects of the introduction of the legislation at an operational level and to provide some support to establishing the required administrative processes that will arise from the Law.
- 5.7 In addition, there will be a requirement to provide additional training for the MHRT members. In total, it is estimated that the costs of implementing the Law could be up to £75,000.
- 5.8 The Committee has made budgetary provision to supplement its internal expertise with additional specialist external input to develop the Code of Practice and to develop a series of training sessions for its staff in readiness for the enactment of the legislation. Whilst it will make every effort to introduce the changes to comply with the Law as far as possible without additional resources to uphold the earlier commitment made by HSSD, it also recognises the significance and importance of the legislation and the need to be sufficiently prepared for the enactment of the Law.

- 5.9 This will become clearer as the detailed Code of Practice is developed and, if necessary, the Committee will request one-off funding from the Budget Reserve in order to adequately resource the implementation of the legislation.

***Proposed development of an Advocacy Service***

- 5.10 The 2016 Policy Letter highlighted the need for advocacy services to be developed to support the Capacity legislation. This is also a matter that has been raised previously in relation to the Mental Health & Wellbeing Plan.
- 5.11 During 2019, the Committee completed a detailed mapping, gap and issue analysis of mental health and wellbeing services in Guernsey and Alderney<sup>14</sup>. This work has identified a number of gaps in services between primary and secondary mental health care and was the subject of an amendment to the Policy & Resource Plan in June 2019 by Deputies Soulsby and Tooley<sup>15</sup>. The amendment referred to the need to build on a range of complementary services to include, for example, signposting to services and activities, access to a programme of social prescribing, peer support, mental health advocacy and support for people experiencing low to moderate amounts of stress or distress. This will also support the aims of the disability frameworks resting with Adult Community Services.
- 5.12 The amendment did not commit the States to allocate any additional financial resources at that time, which it was agreed would be subject to the relevant business case (or cases) subsequently being approved through the Budget process.
- 5.13 The Capacity Law will introduce the role of Independent Capacity Representatives (ICRs) to represent the interests of those who lack capacity and who do not have family or friends to offer such support. It is anticipated that ICRs would have a role in respect of both the Protective Authorisation Scheme and the legislation in general, for example, in respect of decisions taken for medical treatment, a change of accommodation or where there may be safeguarding concerns. This further enhances the need for an advocacy service to be developed.
- 5.14 As the Committee would not be able to resource this new service development from within its existing resources, it is appropriate to bring this to the attention of the States. In preparation for the introduction of the legislation, the Committee will further investigate the possibility of working with related Third

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<sup>14</sup> This is available from the States of Guernsey website - [Mental Health and Wellbeing Plan](#)

<sup>15</sup> Policy & Resources Committee – ‘Policy & Resource Plan – 2018 Review and 2019 Update’ – [Amendment 12 Billet d’État IX 2019](#)

Sector organisations to scope out how an advocacy service could be delivered in partnership. It is suggested that there is the potential for such a service to support both the requirements of the Capacity Law and address the shortfall in advocacy services identified by the gap analysis of mental health and wellbeing services.

- 5.15 This is an opportunity to fulfil the aspirations of the Partnership of Purpose and to consider how the Third Sector may support the delivery of these aims.
- 5.16 Acknowledging that this aspect is under development and requires further detailed consideration, Proposition 5 asks the States to note that the CfHSC will report back to the States with proposals for the introduction of an advocacy service and before any financial resources are committed to introducing such a service. This may form part of a future Committee update to the Policy & Resource Plan or as part of the Budget process.

## **6. Consultation and engagement**

- 6.1 A period of targeted engagement on the draft legislation took place over the summer of 2019. This involved a wide range of stakeholders, including representatives from the residential and nursing care home sector; the Guernsey Bar, Third Sector organisations, charities and voluntary groups and other health and social care bodies, including the medical practice groups and the Medical Specialist Group.
- 6.2 This allowed the Committee, at an early stage, to seek valuable feedback on the practical application of some of the provisions within the draft Law for those in the community who will have operational responsibility for the relevant issues arising from the legislation. In particular, this engagement has informed the drafting of the Capacity Law and some of the language was adjusted to reflect the preferences of the consultees.
- 6.3 The Committee is planning a further series of events to update those stakeholders and to enhance general awareness of the Law before it comes into effect.

## **7. Conclusion**

- 7.1 The Capacity Law has been developed with the principal purpose of empowering people to make decisions for themselves wherever possible.
- 7.2 Careful consideration has been given to ensure that the new provisions that will be introduced by the legislation are those that would most effectively assist and

protect members of the community in the Bailiwick and are sufficiently robust and respectful of the human rights of those who lack capacity.

- 7.3 The CfHSC considers that the supplementary policy matters set out in Section 3 of this Policy Letter are consistent with the original policy intentions for the legislation and asks the States to agree to their inclusion within the Projet de Loi.
- 7.4 The Committee is also of the view that in line with the arrangements in place for appeals brought forward under the Mental Health Law, 2010, Legal Aid should be available to an individual or their appointed Representative to appeal decisions made under the Protective Authorisation Scheme. It recognises the funding implications of doing so, but also acknowledges the value of having such a legal framework in place, which must meet human rights obligations.
- 7.5 Most of the resource implications arising from the Law will fall within Health & Social Care and, as described in Section 5, efforts will be made to establish new processes arising from the Law within existing resources. The Committee recognises the value of the support from private and third sectors organisations to implement the legislation and of exploring a partnership approach to the development of an advocacy service.
- 7.6 The Committee recommends to the States to approve the Propositions to which this Policy Letter is attached.

## **8. Compliance with Rule 4**

- 8.1 Rule 4 of the Rules of Procedure of the States of Deliberation and their Committees sets out the information which must be included in, or appended to, motions laid before the States.
- 8.2 In accordance with Rule 4(1), the Propositions have been submitted to Her Majesty's Procureur for advice on any legal or constitutional implications. She has advised that there is no reason in law why the Propositions should not to be put into effect.
- 8.3 In accordance with Rule 4(3), the Committee has included Propositions which request the States to note that there will be an additional requirement for funding associated for the MHCRT, in due course, and to provide Legal Aid to those wishing to appeal. Further information is provided in section 4.
- 8.4 In accordance with Rule 4(4) of the Rules of Procedure of the States of Deliberation and their Committees, it is confirmed that the Propositions above have the unanimous support of the Committee.

- 8.5 Deputy Tindall wishes to record her dissent with the proposal in Paragraph 3.7 to establish a registration system for LPAs in relation to property and financial affairs through H.M. Greffier.
- 8.6 In accordance with Rule 4(5), the Propositions relate to the duties of the Committee *for* Health & Social Care to protect, promote and improve the health and wellbeing of individuals and the community.
- 8.7 Also in accordance with Rule 4(5), the Committee has carried out targeted engagement in the community with those who will most closely be involved in implementing the legislation. The feedback received has been taken into account during the drafting of the Capacity Law.

Yours faithfully

H J R Soulsby  
President

R H Tooley  
Vice-President

R G Prow  
D A Tindall  
E A McSwiggan

R H Allsopp, OBE  
Non-States Member



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Date: 08 January 2020

**By email**

Dear Deputy Soulsby

**Letter of comment: ‘Capacity Law’ – Supplementary policy matters and potential financial implications arising from the appeals process**

The Committee *for* Employment & Social Security has considered the Committee *for* Health & Social Care’s policy letter entitled “‘Capacity Law’ – Supplementary policy matters and potential financial implications arising from the appeals process”.

The Committee supports the propositions and intention of the policy letter, recognising that it contributes to the aims of the Disability and Inclusion Strategy. While the proposals will generate some additional costs for the Guernsey Legal Aid Service, the Committee recognises the importance of empowering individuals who may lack capacity to make their own decisions, and ensuring that they are able to appeal decisions made under the Protective Authorisation Scheme. A part of that is providing them with access to Legal Aid, so that they have appropriate representation at Tribunals, and if necessary, in the Courts, which complies with human rights requirements.

The Committee is grateful for the opportunity to comment on the policy letter and hopes that the States supports the propositions.

Yours sincerely

Deputy Michelle Le Clerc  
President

**THE STATES OF DELIBERATION**  
**of the**  
**ISLAND OF GUERNSEY**

**COMMITTEE FOR HEALTH & SOCIAL CARE**

**'CAPACITY LAW' - SUPPLEMENTARY POLICY MATTERS AND POTENTIAL FINANCIAL  
IMPLICATIONS ARISING FROM THE APPEALS PROCESS**

The President  
Policy & Resources Committee  
Sir Charles Frossard House  
La Charroterie  
St Peter Port

20<sup>th</sup> January, 2020

Dear Sir,

**Preferred date for consideration by the States of Deliberation**

In accordance with Rule 4(2) of the Rules of Procedure of the States of Deliberation and their Committees, the Committee for Health & Social Care (CfHSC) requests that the propositions contained in its policy letter entitled "Capacity Law' – Supplementary Policy Matters and Potential Financial Implications Arising from the Appeals Process', dated 20<sup>th</sup> January, 2020 be considered at the States' meeting to be held on 26<sup>th</sup> February, 2020.

This request is made on the basis that agreement of the States to the matters outlined in the policy letter will provide a clear policy direction to inform the legislative drafting in these areas. Most importantly, keeping to this timetable will allow the Capacity (Bailiwick of Guernsey) Law to return for consideration by the States during this political term.

This workstream is an important part of the Disability and Inclusion Strategy and has been the Committee's top legislative priority. The CfHSC is therefore keen to progress this matter in the timeliest way.

Yours faithfully,



H J R Soulsby  
President



R H Tooley  
Vice-President

R G Prow  
D A Tindall  
E A McSwiggan

R H Allsopp, OBE  
Non-States Member