

Capacity

The Island awaits the commencement of the Capacity Act 2022 (the “**Act**”), which will come into operation on such day as the Department of Health and Social Care by order appoints. Until such time, the laws governing capacity are found within the Mental Health Act 1998 and the Powers of Attorney Act 1987.

The Act has drawn inspiration from the Mental Capacity Act 2005, in England and Wales, and the amendments that have been made to that act by the Mental Capacity (Amendment) Act 2019.

The Act will extend the powers, which currently cover financial matters only, to include medical care. Presently, decisions about care are made based on common law and are often documented in a ‘living will’; a document that is merely persuasive.

The current Enduring Power of Attorney (for decision-making relating to financial matters only) will be replaced by a Lasting Power of Attorney (for both property and financial affairs, and health and welfare), meaning that advance decisions made by patients about future care will be protected.

Under the new Act the starting point is always that a person is presumed to have capacity. A person’s capacity to make decisions may be impaired on a permanent or temporary basis, and for a variety of reasons; if they are unable comprehend the information relevant to the decision, they are unable retain that information for the appropriate period, or they are unable to “weigh” it or to communicate it.

Under the Act, steps and decisions taken on behalf of someone who lacks capacity must be made and done in the person’s best interests. For further protection, the new Act will give the courts the authority to appoint someone to hold power of attorney, if such a person has not been selected by the time capacity is lost.

Regardless of the impending commencement of the Act, it is imperative that the issue of capacity is considered when any decisions are made (and taken) in relation to a person’s financial and property affairs, or health and welfare. Examples of such include in relation to the signing of a Will, a trust deed or a letter of wishes, or the making of investment decisions or a Power of Attorney. If a person is deemed not to have capacity at the time of the decision-making or signing of a document, then the action/document is potentially void. Care should be taken to ensure that a person has capacity at such time, and advice should be taken in cases of any doubt.

Catherine French

Disclaimer

The information and/or opinions contained in this article is necessarily brief and general in nature and does not constitute legal or taxation advice. Appropriate legal or other professional advice should be sought for any specific matter. Any reliance on such information and/or opinions is therefore solely at the user’s own risk and DQ Advocates Limited (and its associates and subsidiaries) is not responsible for, and does not accept any responsibility or liability in connection with any action taken or reliance placed upon such content.