

Lasting Powers of Attorney and Capacity Act 2018

Principal Act

Act. No. 2018-04	<i>Commencement LN.2018/077</i>	23.04.2018
	<i>Assent</i>	21.02.2018
Amending enactments	Relevant current provisions	Commencement date
Act. 2023-04 s. 3(1)		18.4.2024

ARRANGEMENT OF SECTIONS

Section

PART 1 – PRELIMINARY

1. Title.
2. Commencement.
3. Interpretation.

PART 2 – LASTING POWERS OF ATTORNEY

4. Appointment of LPA Registrar.
5. Duties of the LPA Registrar.
6. Lasting powers of attorney: two types.
7. Execution formalities.
8. Registration of an LPA.
9. Appointment of donee
10. Requirements as to content of an LPA.
11. LPA restrictions.
12. Scope of LPA: gifts
13. Revocation of LPA.
14. Protection of donee and others if no power created or power revoked.
15. Regulations.
16. Code of Practice.
17. Powers of court in relation to validity of LPAs.
18. Powers of court in relation to operation of an LPA.
19. Offences.

PART 3 – ADVANCE DECISIONS TO REFUSE TREATMENT

20. Advance decisions to refuse treatment: general.
21. Validity and applicability of advance decisions.
22. Effect of advance decisions.
23. Excluded decisions.

PART 4 - PERMITTED ACTS, ETC.

24. Best interests decision making and general principles of permitted acts in connection with care and treatment of persons lacking capacity.
25. Limitation to s.24: Acts of restraint which are not permitted.
26. Mental Health Act matters.

PART 5 – SIGNIFICANT RESTRICTION ON LIBERTY

27. Circumstances permitting a significant restriction on liberty.
28. Measures classified as a significant restriction on liberty.
29. Arrangements to be made by Minister: designation of assessors.
30. Arrangements to be made by Chief Medical Officer: requirement for authorisation.
31. Urgent authorisations.
32. Request for assessment.
33. Manner of assessment.
34. Report of assessment.
35. Effect of report.
36. Record of assessments.
37. Standard authorisations.
38. Rectification etc. of reports and recommendations.
39. P to be notified of authorisation.
40. Independent capacity advocate to be appointed.
41. Renewal of standard authorisation.
42. Standard authorisation: review by Manager or member of the Care Agency designated with responsibility for P's care.
43. Continuity of authorisation: changes of place and in management.
44. Review of authorisations by Tribunal.
45. Monitoring of authorisations.
46. Powers of Court in relation to grant etc. of authorisations.
47. Appeals.
48. Temporary restriction of liberty for purpose of life-sustaining treatment.
49. Authorisation as authority to take and convey P.

PART 6 – INDEPENDENT CAPACITY ADVOCATES

50. Application of this Part.
51. Appointment of independent capacity advocates.
52. Functions of independent capacity advocates.
53. Support where serious medical treatment is proposed.
54. Support where provision of or change in accommodation is proposed.

PART 7 - MISCELLANEOUS

55. Protection for acts done in pursuance of this Act.
56. Regulations.
57. Amendments to the Mental Health Act 2016.
58. Consequential amendments and transitional provisions.
59. Amendments to the Medical (Gibraltar Health Authority) Act, 1987 and the Care Agency Act 2009.

SCHEDULE 1

AMENDMENTS TO THE MENTAL HEALTH ACT 2016

2018-04 **Lasting Powers of Attorney and Capacity**

SCHEDULE 2
CONSEQUENTIAL AMENDMENTS

SCHEDULE 3
AMENDMENTS TO THE MEDICAL (GIBRALTAR HEALTH AUTHORITY) ACT, 1987
AND THE CARE AGENCY ACT 2009

AN ACT TO ESTABLISH AND MAKE PROVISIONS RELATING TO PERSONS WHO ANTICIPATE THEY MAY LACK CAPACITY IN FUTURE TO MANAGE THEIR HEALTH, WELFARE, PROPERTY AND FINANCIAL AFFAIRS; TO ALLOW SUCH PERSONS TO CONFER AUTHORITY ON INDIVIDUALS TO MAKE CERTAIN DECISIONS ON THEIR BEHALF; TO ALLOW FOR THE CREATION AND REGISTRATION OF LASTING POWERS OF ATTORNEY; TO MAKE PROVISION FOR A PERSON TO BE ABLE TO DECIDE ABOUT SPECIFIC TREATMENT THEY MAY NOT WANT TO RECEIVE IN FUTURE; TO INTRODUCE A REGIME AND SAFEGUARDS FOR THE ASSESSMENT AND AUTHORISATION OF SIGNIFICANT RESTRICTIONS ON LIBERTY FOR PERSONS WHO LACK CAPACITY AND FOR DECISIONS TO BE TAKEN IN RELATION TO OR ON BEHALF OF THOSE PERSONS; TO AMEND THE MENTAL HEALTH ACT 2016; TO AMEND THE MEDICAL (GIBRALTAR HEALTH AUTHORITY) ACT, 1987 AND THE CARE AGENCY ACT 2009; AND FOR PURPOSES CONNECTED THEREWITH.

PART 1 – PRELIMINARY

Title.

1. This Act may be cited as the Lasting Powers of Attorney and Capacity Act 2018.

Commencement.

2.(1) This Act comes into operation on a date to be appointed by the Minister by notice published in the Gazette.

(2) Different dates may be appointed for different provisions and for different purposes of this Act.

Interpretation.

3.(1) In this Act, unless the context otherwise requires-

“adoption order” means an adoption order within the meaning of the Adoption Act 2023;

“advance decision” means a decision made in accordance with section 20(1);

“assessor” means a person designated under section 29;

“Board” means the Mental Health Board established under Part 9 of the Mental Health Act;

“Care Agency” means the care agency established under section 3 of the Care Agency Act 2009;

2018-04 **Lasting Powers of Attorney and Capacity**

“Care Home” means an establishment that provides accommodation, together with nursing or personal care, for persons who are or have been ill, persons who have or have had a mental disorder, persons who are incapacitated, disabled or infirm or persons who are or have been dependent on alcohol or drugs, which is not a Hospital, independent clinic or a children’s home;

“Court” means the Court of Protection under section 64(1) of the Mental Health Act;

“customary occasion” means-

- (a) the occasion or anniversary of a birth, a marriage or the formation of a civil partnership; or
- (b) any other occasion on which presents are customarily given within families or among friends or associates;

“deputy” means a deputy appointed by the Court under Part 5 of the Mental Health Act;

“donee” means a person appointed under an LPA who is conferred authority to make decisions on behalf of the donor in accordance with the provisions of an LPA;

“donor” means a person who confers on a donee authority to make decisions on his behalf in accordance with the provisions of an LPA;

“Hospital” has the same meaning as in section 1(3) of the Mental Health Act;

“independent capacity advocate” or “ICA” means a person appointed under Part 6;

“life-sustaining treatment” has the same meaning as in section 89(10) of the Mental Health Act;

“LPA” means a lasting power of attorney made in accordance with section 6;

“LPA Register” means the Lasting Power of Attorney Register at the Supreme Court of Gibraltar or such other registry as may be used in this regard from time to time;

“Manager” means such person or persons designated by the Minister to be a Manager of a relevant place for the purposes of this Act;

“Mental Health Act” means the Mental Health Act 2016;

“Minister” means the Minister with responsibility for health;

“nearest relative” has the meaning given in section 35 of the Mental Health Act;

- “negative” in relation to Part 5, has the meaning given in section 35(2);
- “permitted act” means an act carried out in accordance with section 24;
- “prescribed” means prescribed by regulations made by the Minister under this Act;
- “registered person” means a social worker practising in Gibraltar or a person registered under the Medical and Health Act, 1997 and registered persons shall be construed accordingly;
- “relevant place” means a Hospital (except any accident and emergency department of a hospital), a Care Home or any establishment or home designated by the Minister to be a relevant place for the purposes of this Act;
- “standard authorisation” means an authorisation given under section 37;
- “Tribunal” means the Mental Health Review Tribunal established under Part 6 of the Mental Health Act; and
- “urgent authorisation” means an authorisation given under section 31.

(2) In this Act-

- (a) references to a person who lacks capacity shall be defined in accordance with the principles set out in sections 86 to 89 of the Mental Health Act; and
- (b) a person’s best interests shall be defined in accordance with the principles set out in section 89 of the Mental Health Act.

(3) Part 5 of this Act-

- (a) does not apply where P is a person liable to be detained under Part 2 of the Mental Health Act; and
- (b) except for section 48, does not apply where P is a person undergoing life-sustaining treatment in any place (and for this purpose “place” includes an ambulance or other vehicle used by the emergency services).

PART 2 – LASTING POWERS OF ATTORNEY

Appointment of LPA Registrar.

4. There shall be a Lasting Powers of Attorney Registrar (in this Act referred to as the “LPA Registrar”) appointed by the Government for the purpose of establishing and maintaining a register of LPAs.

Duties of the LPA Registrar.

5.(1) The LPA Registrar shall perform all such duties as may be required from time to time in order to establish and maintain a register of LPAs.

(2) The LPA Registrar may also publish any information he thinks appropriate about the discharge of his functions.

Lasting powers of attorney: two types.

6.(1) An LPA is a power of attorney under which the donor confers on the donee authority to make decisions about all or any of the following—

- (a) the donor’s property and affairs or specified matters concerning the donor’s property and affairs (in this Act referred to as a “Property and Financial LPA”); and
- (b) the donor’s health and welfare or specified matters concerning the donor’s health and welfare (in this Act referred to as a “Health and Welfare LPA”),

and which includes authority to make such decisions in circumstances where the donor no longer has capacity.

(2) An LPA is not created unless-

- (a) section 7 (execution formalities) and section 9 (appointment of donee) are complied with;
- (b) it is made in accordance with section 10 (requirements as to content of an LPA) and registered in accordance with section 8 (registration of an LPA); and
- (c) at the time when the donor executes the instrument, he has reached the age of 18 and has capacity to execute it.

(3) An instrument which-

- (a) purports to create an LPA; but
- (b) does not comply with this section and sections 7 to 10,

confers no authority.

(4) The authority conferred by an LPA is subject to-

- (a) the provisions of this Act and the principles set out in sections 86 (the principles) and 89 (best interests) of the Mental Health Act; and
- (b) such conditions or restrictions as may be specified in the LPA.

Execution formalities.

7.(1) An instrument creating an LPA shall be in writing, and signed by the donor, or by some other person in his presence and by his direction, in the presence of two or more witnesses present at the same time.

- (2) Each witness must either-
 - (a) attest and sign the LPA; or
 - (b) acknowledge the donor's signature, in the presence of the donor (but not necessarily in the presence of any other witness),

but no form of attestation shall be necessary.

Registration of an LPA.

8.(1) An application for the registration of an LPA must be made to the LPA Registrar-

- (a) in the prescribed form;
- (b) by the donor or by the donee;
- (c) accompanied by the prescribed fee; and
- (d) within the prescribed time period.

(2) The LPA Registrar shall enter in the LPA Register the following particulars-

- (a) the name of the donor;
- (b) the name of the donee;
- (c) the type of LPA, whether a Property and Financial LPA or a Health and Welfare LPA;
- (d) the date of its creation; and
- (e) the date of its registration.

2018-04 **Lasting Powers of Attorney and Capacity**

(3) The LPA Registrar shall give a certificate of the recording of the LPA, stating the particulars specified in subsection (2), and the certificate shall be conclusive evidence that the requirements as to recording have been complied with.

(4) The LPA Registrar may refuse to register an LPA where-

- (a) the prescribed fee has not been paid in relation to the registration;
- (b) he is not satisfied that it has been duly executed;
- (c) in his opinion the nature of the application requires consideration by the Court; or
- (d) the LPA has not been presented to the LPA Registrar for registration within the prescribed time period.

(5) The LPA Registrar may require evidence by way of an affidavit or otherwise to prove to his satisfaction that an LPA has been duly executed.

(6) Where the LPA Registrar refuses to register an LPA pursuant to subsection (4), he may instruct the applicant to apply to Court for an order for registration.

(7) The LPA Registrar is not liable for errors contained in an LPA supplied to him.

Appointment of donee.

9.(1) The donee of an LPA must be an individual who is aged 18 years or over.

(2) An individual who is bankrupt may not be appointed as a donee of an LPA in relation to a Property and Financial LPA.

(3) Where authority is conferred on more than one donee, the LPA may appoint them to act-

- (a) in respect of all matters either jointly, or jointly and severally; or
- (b) jointly in respect of some matters and jointly and severally in respect of others.

(4) To the extent to which it does not specify whether they are to act jointly or jointly and severally, the instrument is to be assumed to appoint them to act jointly.

(5) If they are to act jointly, a failure, in relation to one of them, to comply with the requirements of subsection (1) or (2) or section 10 (requirements as to content of an LPA) prevents an LPA from being created.

(6) If they are to act jointly and severally, a failure, in relation to one of them, to comply with the requirements of subsection (1), (2) or section 10-

- (a) prevents the appointment taking effect in his case; but
 - (b) does not prevent an LPA from being created and authority conferred on the other persons.
- (7) An instrument used to create an LPA-
- (a) cannot give the donee (or, if more than one, any of them) power to appoint a substitute or successor; but
 - (b) may itself appoint a person to act as substitute for the donee, (or, if more than one, any of them), on the occurrence of an event mentioned in section 13(5) which has the effect of terminating the donee's appointment.

Requirements as to content of an LPA.

10.(1) The LPA must include-

- (a) the prescribed information about the purpose of the instrument and the effect of an LPA;
- (b) a statement by the donor to the effect that he-
 - (i) has read the prescribed information or a prescribed part of it (or has had it read to him); and
 - (ii) intends the authority conferred under the LPA to include authority to make decisions on his behalf in circumstances where he no longer has capacity;
- (c) a statement by the donee (or, if more than one, each of them) to the effect that he-
 - (i) has read the prescribed information or a prescribed part of it (or has had it read to him); and
 - (ii) understands the duties imposed on a donee of an LPA under sections 86 (the principles) and 89 (best interests) of the Mental Health Act; and
- (d) a certificate by a person of a prescribed description that, in his opinion, at the time when the donor executes the instrument-
 - (i) the donor understands the purpose of the instrument and the scope of the authority conferred under it;

- (ii) no fraud or undue pressure is being used to induce the donor to create an LPA; and
- (iii) there is nothing else which would prevent an LPA from being created by the instrument.

(2) Subject to subsection (3), the following persons are a “person of a prescribed description” for the purposes of subsection (1)(d)-

- (a) a person chosen by the donor as being someone who has known him personally for the period of at least two years before the date on which the person signs the certificate described in subsection (1)(d);
 - (b) a person chosen by the donor, on account of his professional skills and expertise, to make the judgments necessary to certify the matters required for the certificate described in subsection (1)(d), such as-
 - (i) a registered person;
 - (ii) a barrister or solicitor admitted or entitled to practise in Gibraltar;
 - (iii) an ICA; or
 - (c) such other person or persons prescribed by the Minister to be a suitable person for the purposes of subsection (1)(d).
- (3) The certificate mentioned in subsection (1)(d) may not be given by-
- (a) a person appointed as a donee under the LPA;
 - (b) a family member of the donor;
 - (c) a business partner or employee of the donor;
 - (d) an owner, director, manager or employee of a Care Home in which the donor is living when the LPA is executed; or
 - (e) a family member of a person mentioned in subsection (3)(d).

(4) If an LPA differs in an immaterial respect from the prescribed form of LPA, it is to be treated by the LPA Registrar as if it complied with the prescribed form.

(5) The Court may declare that an instrument which fails to meet the prescribed form is to be treated as if it were in the prescribed form, if it is satisfied that the persons executing the instrument intended it to create an LPA.

(6) If it appears to the LPA Registrar that an instrument accompanying an application is not made in accordance with this section, he must not register the instrument unless the Court directs him to do so.

(7) If it appears to the LPA Registrar that the instrument contains a provision which-

- (a) would be ineffective as part of an LPA; or
- (b) would prevent the instrument from operating as a valid LPA,

he must apply to the Court for it to determine the matter under section 17 (powers of Court in relation to validity of LPAs) and, pending the determination by the Court, must not register the instrument.

(8) Subsection (9) applies if the Court determines (whether or not on an application by the LPA Registrar) that the instrument contains a provision which-

- (a) would be ineffective as part of an LPA; or
- (b) would prevent the instrument from operating as a valid LPA.

(9) The Court must-

- (a) notify the LPA Registrar that it has severed the provision; or
- (b) direct him not to register the instrument.

(10) Where the Court notifies the LPA Registrar that it has severed a provision, the LPA Registrar must register the instrument with a note to that effect attached to it.

LPA restrictions.

11.(1) An LPA does not authorise the donee (or, if more than one, any of them) to do an act that is intended to restrain the donor, unless the following three conditions are satisfied-

- (a) the donor lacks, or the donee reasonably believes that the donor lacks, capacity in relation to the matter in question;
- (b) the donee reasonably believes that it is necessary to do the act in order to prevent harm to the donor; and
- (c) the act is a proportionate response to-
 - (i) the likelihood of the donor suffering harm; and

(ii) the seriousness of that harm.

(2) For the purposes of subsection (1), the donee restrains the donor if he-

- (a) uses, or threatens to use, force to secure the doing of an act which the donor resists; or
- (b) restricts the donor's liberty of movement, whether or not the donor resists or objects to the restriction.

(3) Where an LPA is a Health and Welfare LPA, the authority-

- (a) only applies to decisions in circumstances where the donor lacks, or the donee reasonably believes that the donor lacks, capacity;
- (b) is subject to the provisions of Part 3 (advance decisions to refuse treatment); and
- (c) extends to giving or refusing consent to the carrying out or continuation of a treatment by a person providing health care for the donor.

(4) Subsection (3)(c)-

- (a) does not authorise the giving or refusing of consent to the carrying out or continuation of life-sustaining treatment, unless the instrument contains express provision to that effect; and
- (b) is subject to any conditions or restrictions in the instrument.

(5) Nothing in this Act authorises a donee of an LPA or a deputy to consent on behalf of a person to arrangements which give rise to a significant restriction on that person's liberty within the meaning of section 28.

Scope of LPA: gifts.

12.(1) Where an LPA confers authority to make decisions about the donor's property and affairs, it does not authorise a donee (or, if more than one, any of them) to dispose of the donor's property by making gifts except to the extent permitted by subsection (2).

(2) The donee may make gifts-

- (a) on a customary occasion to persons (including himself) who are related to or connected with the donor; or
- (b) to any charity to whom the donor made or might have been expected to make gifts,

if the value of each such gift is not unreasonable having regard to all the circumstances and, in particular, the size of the donor's estate.

(3) Subsection (2) is subject to any conditions or restrictions contained in the LPA.

Revocation of LPA.

13.(1) This section applies if-

- (a) the donor has executed an instrument with a view to creating an LPA; or
- (b) an LPA is registered as having been conferred by the donor,

and in this section references to revoking the power include revoking the instrument.

(2) The donor may, at any time when he has capacity to do so, revoke the power.

(3) The donor's bankruptcy revokes the power so far as it relates to the donor's property and affairs.

(4) The occurrence in relation to a donee of an event mentioned in subsection (5)-

- (a) terminates his appointment; and
- (b) except in the cases given in subsection (6), revokes the power.

(5) The events mentioned in subsection (4) are-

- (a) the written disclaimer of the appointment by the donee, which has been filed in the LPA Register and a copy of such disclaimer provided to the donor and any other donee appointed under the LPA (if relevant);
- (b) subject to subsection (7), the death or bankruptcy of the donee;
- (c) subject to subsection (8), the dissolution or annulment of a marriage or civil partnership between the donor and the donee; or
- (d) the lack of capacity of the donee.

(6) The cases mentioned in subsection 4(b) are-

- (a) the donee is replaced by a substitute under the terms of the instrument; or

- (b) the donee is one of two or more persons appointed to act jointly and severally in respect of any matter and, after the event, there is at least one such person remaining.
- (7) The bankruptcy of a donee does not terminate his appointment, or revoke the power, in so far as his authority relates to the donor's health and welfare.
- (8) The dissolution or annulment of a marriage or civil partnership does not terminate the appointment of a donee, or revoke the power, if the instrument provided that it was not to do so.

Protection of donee and others if no power created or power revoked.

14.(1) Subsections (2) and (3) apply if-

- (a) an instrument has been registered under section 8 as an LPA; but
- (b) an LPA was not created,

whether or not the registration has been cancelled at the time of the act or transaction in question.

(2) A donee who acts in purported exercise of the power does not incur any liability (to the donor or any other person) because of the non-existence of the power, unless, at the time of acting he-

- (a) knows that an LPA was not created; or
- (b) is aware of circumstances which, if an LPA had been created, would have terminated his authority to act as a donee.

(3) Any transaction between the donee and another person is, in favour of that person, as valid as if the power had been in existence, unless at the time of the transaction that person has knowledge of a matter referred to in subsection (2).

(4) If the interest of a purchaser depends on whether a transaction between the donee and the other person was valid by virtue of subsection (3), it is conclusively presumed in favour of the purchaser that the transaction was valid if-

- (a) the transaction was completed within 12 months of the date on which the instrument was registered; or
- (b) the other person makes a statutory declaration, before or within 3 months after the completion of the purchase, that he had no reason at the time of the transaction to

doubt that the donee had authority to dispose of the property which was the subject of the transaction.

(5) In its application to an LPA which relates to matters in addition to the donor's property and affairs, section 6 of the Powers of Attorney Act 1972 (protection of donees and third parties) has effect as if references to revocation included the cessation of the power in relation to the donor's property and affairs.

(6) Where two or more donees are appointed under an LPA, this section applies as if references to the donee were to all or any of them.

Regulations.

15. The Minister may make regulations as he considers necessary for the purposes of—

- (a) the registration of an LPA;
- (b) appropriate fees in relation to the registration of an LPA or a search of the LPA Register;
- (c) making different provisions according to whether an LPA relates to health and welfare or to property and affairs;
- (d) setting out the prescribed form for a certificate to be issued in accordance with section 10(1)(d); and
- (e) such other matters as may be deemed necessary from time to time.

Code of practice.

16.(1) The Minister may issue, and from time to time revise, a code of practice for the guidance of a donee of an LPA.

(2) The donee of an LPA has a binding duty to have regard to the code of practice issued under subsection (1).

(3) The Minister may publish the code of practice which is for the time being in force in such manner as may appear to the Minister to be appropriate for bringing it to the attention of persons likely to be concerned with or affected by its provisions.

Powers of Court in relation to validity of LPAs.

17.(1) This section and section 18 (powers of Court in relation to operation of an LPA) apply if—

2018-04 **Lasting Powers of Attorney and Capacity**

- (a) the donor has executed or purported to execute an instrument with a view to creating an LPA; or
 - (b) an instrument has been registered as an LPA conferred by the donor.
- (2) The Court may determine any question relating to-
- (a) whether one or more of the requirements for the creation of an LPA have been met; or
 - (b) whether the power has been revoked or has otherwise come to an end.
- (3) Subsection (4) applies if the Court is satisfied-
- (a) that fraud or undue pressure was used to induce the donor-
 - (i) to execute an instrument for the purpose of creating an LPA; or
 - (ii) to create an LPA; or
 - (b) that the donee (or, if more than one, any of them) of an LPA-
 - (i) has behaved, or is behaving, in a way that contravenes his authority or is not in the donor's best interests; or
 - (ii) proposes to behave in a way that would contravene his authority or would not be in the donor's best interests.
- (4) The Court may-
- (a) direct that an instrument purporting to create an LPA is not to be registered; or
 - (b) if the donor lacks capacity to do so, revoke the instrument or the LPA.
- (5) If there is more than one donee, the Court may under subsection (4)(b) revoke the instrument or the LPA so far as it relates to any of them.
- (6) In this section “donee” includes an intended donee.

Powers of Court in relation to operation of an LPA.

18.(1) The Court may determine any question as to the meaning or effect of an LPA or an instrument purporting to create one.

- (2) The Court may-

- (a) give directions with respect to a decision which the donee of an LPA has authority to make when the donor lacks capacity to make it; and
 - (b) give any consent or authorisation to act, which the donee would have to obtain from the donor, if the donor had capacity to give the consent or authorisation.
- (3) The Court may, if the donor lacks capacity to do so-
- (a) give directions to the donee with respect to the rendering by him of reports or accounts and the production of records kept by him for that purpose;
 - (b) require the donee to supply information or produce documents or things in his possession as a result of the authority conferred on him as the donee;
 - (c) give directions with respect to the remuneration or expenses of the donee;
 - (d) relieve the donee wholly or partly from any liability which he has or may have incurred on account of a breach of his duties as the donee; or
 - (e) make such other directions as it considers necessary.
- (4) The Court may authorise the making of gifts which are not within section 12(2) (permitted gifts).
- (5) Where two or more donees are appointed under an LPA, this section applies as if references to the donee were to all or any of them.

Offences.

19.(1) It is an offence for any person who is appointed as a donee of an LPA to ill-treat or wilfully neglect the donor.

- (2) Any person guilty of an offence against this section shall be liable—
- (a) on summary conviction, to imprisonment for a term not exceeding twelve months or to a fine not exceeding level 5 on the standard scale, or to both; or
 - (b) on conviction on indictment, to imprisonment for a term not exceeding 10 years or to a fine, or to both.

PART 3 – ADVANCE DECISIONS TO REFUSE TREATMENT

Advance decisions to refuse treatment: general.

2018-04 **Lasting Powers of Attorney and Capacity**

20.(1) An advance decision is a decision made by a person “P” who is aged 16 years or over who has capacity to make the decision, that specified treatment is not to be carried out or continued by a person providing health care for P, at a later time and in such circumstances as P may specify, when P lacks the capacity to consent to the treatment.

(2) An advance decision may be regarded as specifying a treatment or circumstances even though expressed in layman's terms.

(3) P may withdraw or alter an advance decision at any time when he has capacity to do so.

(4) A withdrawal (including a partial withdrawal) need not be in writing.

(5) An alteration of an advance decision need not be in writing (unless section 21(5) applies in relation to the decision resulting from the alteration).

Validity and applicability of advance decisions.

21.(1) An advance decision does not have effect in accordance with section 22 (effect of advance decisions) unless at the material time the decision is-

- (a) valid; and
- (b) applicable to the treatment.

(2) An advance decision is not valid if P-

- (a) has withdrawn the decision at a time when he had capacity to do so;
- (b) has, under an LPA created after the advance decision was made, conferred authority on the donee (or, if more than one, any of them) to give or refuse consent to the treatment to which the advance decision relates; or
- (c) has done anything else clearly inconsistent with the advance decision remaining his fixed decision.

(3) An advance decision is not applicable to the treatment in question if at the material time P has capacity to give or refuse consent to it.

(4) An advance decision is not applicable to the treatment in question if-

- (a) that treatment is not the treatment specified in the advance decision;
- (b) any circumstances specified in the advance decision are absent; or

- (c) there are reasonable grounds for believing that circumstances exist which P did not anticipate at the time of the advance decision and which would have affected P's decision had he anticipated them.
- (5) An advance decision is not applicable to life-sustaining treatment unless-
- (a) the decision is verified by a statement by P that it is to apply to that treatment even if P's life is at risk;
 - (b) the decision or statement is in writing, signed by P or by another person in P's presence and by P's direction;
 - (c) the signature is made or acknowledged by P in the presence of a witness; and
 - (d) the witness signs the decision in P's presence.
- (6) An advance decision refusing treatment for a mental disorder can be overruled if treatment could lawfully be given compulsorily under Part 3 (consent to treatment) of the Mental Health Act.

Effect of advance decisions.

22.(1) If P has made an advance decision which is-

- (a) valid; and
- (b) applicable to a treatment,

the decision has effect as if P made it, and had capacity to make it, at the time when a question arises as to whether the treatment should be carried out or continued.

(2) A person does not incur liability for carrying out or continuing the treatment unless, at the time, he is satisfied that an advance decision exists which is valid and applicable to the treatment and despite that knowledge, carries out or continues the treatment.

(3) A person does not incur liability for the consequences of withholding or withdrawing a treatment from P if, at the time, he reasonably believes that an advance decision exists which is valid and applicable to the treatment.

(4) The Court may make a declaration as to whether an advance decision-

- (a) exists;
- (b) is valid; or

2018-04 **Lasting Powers of Attorney and Capacity**

(c) is applicable to a treatment.

(5) While a decision on any relevant issue is sought from the Court, nothing in an apparent advance decision prevents a person-

(a) providing life-sustaining treatment; or

(b) doing any act he reasonably believes to be necessary to prevent a serious deterioration in P's condition.

Excluded decisions.

23. Nothing in this Act permits a decision on any of the following matters to be made on behalf of a person-

(a) consenting to marriage or a civil partnership;

(b) consenting to sexual relations;

(c) consenting to a decree of divorce being granted on the basis of two years' separation;

(d) consenting to a dissolution order being made in relation to a civil partnership on the basis of two years' separation;

(e) consenting to a child being placed for adoption by an adoption agency;

(f) consenting to the making of an adoption order; or

(g) discharging parental responsibilities in matters not relating to a child's property.

PART 4 – PERMITTED ACTS, ETC.

Best interests decision making and general principles of permitted acts in connection with care and treatment of persons lacking capacity.

24.(1) Subject to section 25, (acts of restraint which are not permitted), a person (“C”) in connection with the care and treatment of another person (“P”) does not incur any liability for an act (a “permitted act”) to P if-

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

(b) when doing the act, C reasonably believes–

- (i) that P lacks capacity in relation to the matter in question;
 - (ii) it will be in P's best interests for the act to be done; and
 - (c) if P had had capacity to give consent in relation to the matter in question, he would have.
- (2) Nothing in subsection (1)–
- (a) excludes any civil or criminal liability of C resulting from C's negligence in doing a permitted act; or
 - (b) affects the operation of Part 3.
- (3) If necessary goods or services are supplied to a person who lacks capacity to contract for the supply, that person must pay a reasonable price for the goods or services.
- (4) In subsection (3), “necessary” means suitable, at the time of supply, to the person's condition in life and to his actual requirements.
- (5) If a permitted act involves payment, C may–
- (a) use money in P's possession–
 - (i) to meet the payment; or
 - (ii) as reimbursement for payment made on P's behalf by C; or
 - (b) be otherwise indemnified by P.
- (6) Subsection (5) does not affect any other power under which C or any person–
- (a) has lawful control of P's money or other property (whether by virtue of a Property and Financial LPA or otherwise); or
 - (b) has power to spend money for P's benefit.

Limitation to s.24: Acts of restraint which are not permitted.

- 25.(1) An act by C which is intended to restrain P is not a permitted act, unless–
- (a) C reasonably believes that it is necessary to do the act in order to prevent harm to P;
 - (b) the act is a proportionate response to–

2018-04 **Lasting Powers of Attorney and Capacity**

- (i) the likelihood of P's suffering harm; and
 - (ii) the seriousness of that harm.
- (2) For the purposes of subsection (1), C restrains P if C–
- (a) uses, or threatens to use, force to secure the doing of an act which P resists; and
 - (b) restricts P's liberty of movement, whether or not P resists or objects to the restriction.
- (3) This section does not generally authorise C to do any act which conflicts with a valid decision made by–
- (a) any other person appointed under an LPA granted by P; or
 - (b) a deputy appointed for P by the Court.
- (4) But an act described in subsection (3) may be a permitted act, where the act involves–
- (a) providing life-sustaining treatment; or
 - (b) doing anything which C reasonably believes to be necessary to prevent a serious deterioration in P's condition,

while awaiting a decision of the Court in respect of any relevant issue.

Mental Health Act matters.

26.(1) Nothing in this Act authorises anyone–

- (a) to give a patient medical treatment for mental disorder; or
- (b) to consent to a patient being given medical treatment for mental disorder,

if, at the time when it is proposed to treat the patient, his treatment is regulated by Part 3 of the Mental Health Act (consent to treatment).

(2) Subsection (1) does not apply to any form of treatment to which section 47 (electro-convulsive therapy, etc) of the Mental Health Act applies if the patient comes within subsection (7) of that section (informal patient under 18 who cannot give consent).

(3) “Medical treatment”, “mental disorder” and “patient” have the same meaning as in the Mental Health Act.

PART 5 – SIGNIFICANT RESTRICTION ON LIBERTY

Circumstances permitting a significant restriction on liberty.

27.(1) If one of the criteria set out in subsection (2) are satisfied, a Manager (“M”) of a relevant place in which a person (“P”) is residing, may lawfully impose a significant restriction on P’s liberty.

- (2) The criteria mentioned in subsection (1) are that in respect of P-
- (a) an urgent authorisation has been granted by the Chief Medical Officer under section 31;
 - (b) a standard authorisation has been granted by the Chief Medical Officer under section 37;
 - (c) an order of the Court has been made under section 46 of this Act (powers of Court in relation to grant etc. of authorisations) or section 65 of the Mental Health Act (general powers of the Court) in relation to a matter concerning P's personal welfare; or
 - (d) the restriction is necessary to enable life-sustaining treatment to be given, as further provided by section 48.

(3) Where one of the criteria in subsection (2) is fulfilled, a person doing any act for the purpose of maintaining a significant restriction on P’s liberty does not incur any liability, in relation to the act, which would not have been incurred if P had capacity to consent, and had consented, to the act being done.

- (4) Subsections (1) and (3)–
- (a) do not exclude the civil liability of any person for loss or damage, or the criminal liability of any person, resulting from negligence in doing an act; and
 - (b) do not authorise a person to do anything except for the purpose of, and in accordance with any conditions of, the authorisation or order of the Court (as the case may be) applying in respect of P.

Measures classified as a significant restriction on liberty.

28.(1) A significant restriction on P’s liberty is created if it applies to P on a regular basis, and:

- (a) P is not allowed, unaccompanied, to leave the relevant place;
 - (b) P is unable to leave the relevant place unassisted, by reason of P's physical impairment or mental disorder, and such assistance as it may be reasonably practicable to provide to P for this purpose is not provided;
 - (c) P's actions are so controlled in the relevant place as to limit P's access to part only of that place;
 - (d) P's actions are controlled, whether or not in the relevant place, by the application of physical force or of restraint whereby a person uses, or threatens to use, force to secure the doing of an act which P resists and it restricts P's liberty of movement, whether or not P resists or objects to the restriction;
 - (e) P is subject, whether or not in the relevant place, to continuous supervision; or
 - (f) P's social contact, whether or not in the relevant place, with persons other than those caring for him or her in the relevant place, is restricted.
- (2) A measure applicable to all residents at a relevant place (other than staff employed at the place) which is intended to facilitate the proper management of that place and does not excessively or unreasonably disadvantage P in particular, shall not be regarded as a significant restriction on P's liberty.
- (3) For the purposes of subsection (2), and for the avoidance of doubt—
- (a) P is not to be regarded as subject to a significant restriction on liberty where P is wholly incapable of leaving the relevant place because of physical impairment; and
 - (b) any limit as to the time or duration of any assistance provided to P, which does not excessively or unreasonably disadvantage P, shall not be taken to mean that assistance is not provided.
- (4) The Minister may by regulations amend this section.

Arrangements to be made by Minister: designation of assessors.

29.(1) For the purposes of assessments to be carried out in accordance with this Part and in fulfilment of the duty imposed by section 30(2), the Minister shall—

- (a) designate registered persons to act as assessors under this Part, and maintain a register of persons so designated; and

- (b) determine the appropriate level of training or professional qualification to be required of persons who may be so designated.

(2) The Minister may by regulations make further provision as to arrangements to be made for the purposes stated in subsection (1) and such provision may include amendment of this section and the time limit in section 34(1)(b).

Arrangements to be made by Chief Medical Officer: requirement for authorisation.

30.(1) The Chief Medical Officer must not authorise the imposition of a significant restriction on liberty unless—

- (a) the authorisation is urgent within the meaning of section 31; or
- (b) the necessity for the significant restriction on liberty has been confirmed by the report of an assessor, following an assessment carried out in accordance with sections 32 to 35.

(2) Where—

- (a) the Chief Medical Officer receives a request under section 32; or
- (b) the Chief Medical Officer otherwise becomes aware that section 32(1)(a) applies and the conditions in section 32(2) are fulfilled in respect of P,

the Chief Medical Officer must as soon as practicable and without undue delay appoint a person to carry out an assessment.

Urgent authorisations.

31.(1) An application may be made to the Chief Medical Officer for an urgent authorisation by an assessor, a member of the Care Agency designated with responsibility for P's care or by the Manager, if such applicant reasonably believes that—

- (a) the duty imposed by section 32(3) applies to the Manager or member of the Care Agency designated with responsibility for P's care;
- (b) it is necessary, in the interests of P's health or safety, that the Manager should have authority to impose a significant restriction on P's liberty before a standard authorisation could reasonably be expected to be granted; and
- (c) it is in P's best interests to be provided with care or treatment in circumstances which would amount to a significant restriction on P's liberty.

2018-04 **Lasting Powers of Attorney and Capacity**

(2) An application under subsection (1) must be in writing and in such form as may be required from time to time but in any event must contain the following matters–

- (a) P's name;
- (b) the applicant's name and the name of any registered person concerned;
- (c) the name and address of the relevant place;
- (d) the grounds for the application; and
- (e) the nature and extent of the proposed restriction on P's liberty.

(3) Upon receipt of an application duly made under this section, the Chief Medical Officer must immediately–

- (a) give notice in writing to the Manager or member of the Care Agency designated with responsibility for P's care that an urgent authorisation is granted; and
- (b) record in writing the grant of the authorisation, the terms and conditions (if any) upon which it is granted, together with the reasons for the grant and for any terms and conditions.

(4) An urgent authorisation shall continue in effect until the Manager or member of the Care Agency designated with responsibility for P's care receives notification–

- (a) of the grant of a standard authorisation in respect of P; or
- (b) that an assessment of P under this Part is negative,

whichever first occurs, but in no case for longer than 28 days following the date of the authorisation.

(5) An urgent authorisation may not be renewed, but a further urgent authorisation may be granted where, following notification to the Manager or member of the Care Agency designated with responsibility for P's care of a negative assessment, the Manager or member of the Care Agency designated with responsibility for P's care considers that–

- (a) a material change in P's circumstances; or
- (b) a material mistake in the initial assessment of P,

justifies a fresh application, and the Manager or member of the Care Agency designated with responsibility for P's care, applies to the Chief Medical Officer under subsection (1) stating, as a ground for the application, a matter described in this subsection.

(6) Nothing in this section shall be taken to permit the imposition of a significant restriction on P's liberty which conflicts with a valid advance decision to refuse treatment—

- (a) made by P under Part 3; and
- (b) of which the Manager or member of the Care Agency designated with responsibility for P's care is aware.

Request for assessment.

32.(1) This section applies where—

- (a) P is resident, or is likely in the next 28 days to be resident, in a relevant place for the purpose of receiving care or treatment; and
- (b) it appears to the Manager or a member of the Care Agency designated with responsibility for P's care, that the conditions in paragraph (2) are fulfilled in respect of P.

(2) The conditions mentioned in subsection (1), are that it is likely—

- (a) that P lacks capacity in relation to giving consent to the arrangements for his care or treatment in the relevant place; and
- (b) that for the purposes of such care or treatment, P is or will be subject to a significant restriction on his liberty.

(3) Where this section applies, the Manager or member of the Care Agency designated with responsibility for P's care must—

- (a) unless subsection (4) applies, notify the Chief Medical Officer of the matters in subsections (1) and (2); and
- (b) in any event, make a request, (in such form and manner, if any, as may be prescribed), for an assessment to be carried out in accordance with section 33.

(4) The Manager or member of the Care Agency designated with responsibility for P's care is not obliged to notify the Chief Medical Officer of the matters in subsection (1) and (2), if they reasonably believe that the Chief Medical Officer is already aware of those matters, but for the avoidance of doubt the admission of a person into guardianship does not prevent this section applying.

Manner of assessment.

2018-04 **Lasting Powers of Attorney and Capacity**

33.(1) The assessor appointed by the Chief Medical Officer under section 30(2) must carry out an assessment in accordance with this section and in a timely manner so as to enable a report to be provided within the time limit in section 34(1)(b).

- (2) The assessment must be carried out by means of one or more interviews with P.
- (3) In any case where-
 - (a) the assessor is not a registered medical practitioner; or
 - (b) there is no medical evidence of P's lack of capacity at the date of the assessment,the assessment must be carried out with a registered medical practitioner, in accordance with subsection (4), who has seen P immediately before the assessment.
- (4) For the purposes of subsection (3), the registered medical practitioner must be-
 - (a) the registered medical practitioner who is responsible for P's care and treatment; or
 - (b) if there is no such practitioner as described in subsection (a), a registered medical practitioner designated by the Minister for this purpose.
- (5) The assessment may include interviews with or representations from such other persons, if any, as are listed in subsection (6) and as may in the assessor's view be appropriate.
- (6) The other persons mentioned in subsection (5), are-
 - (a) P's guardian, if any;
 - (b) any person on whom authority has been conferred by a Health and Welfare LPA;
 - (c) any deputy appointed by the Court with responsibility for matters relating to P's personal welfare;
 - (d) any person otherwise nominated by P, if P has capacity to make such a nomination; and
 - (e) any other person who is P's nearest relative.
- (7) The assessment must be such as to enable the assessor to form a view in respect of each of the following matters (the "capacity and liberty matters"), namely-
 - (a) whether P lacks capacity in relation to giving consent to the arrangements for his care or treatment in the relevant place;

- (b) whether it is necessary to impose, as a component of that care or treatment, a significant restriction on P's liberty in the interests of P's health or safety; and
 - (c) if so, whether it is in P's best interests to be provided with care or treatment in circumstances where such a restriction will be imposed.
- (8) For the purpose of carrying out an assessment, the assessor–
- (a) shall be permitted at all reasonable times–
 - (i) to visit P in the relevant place;
 - (ii) to interview P either privately or, where there is in relation to P a person listed in subsection (6), in the presence of that person; and
 - (iii) to inspect and take copies of all medical or other records relating to P and kept by the Chief Medical Officer, the Board, the Manager, or any other provider of care or treatment to P; and
 - (b) may interview or otherwise receive representations from the Manager or any person listed in subsection (6).
- (9) The Minister may by regulations make further provision as to the conduct of assessments under this Part, including (without prejudice to the generality of this power), provision as to–
- (a) the information which may be sought by assessors or to which they must have regard in carrying out assessments;
 - (b) persons who may be consulted by assessors for the purpose of carrying out assessments; and
 - (c) the content to be included by assessors in their reports.

Report of assessment.

- 34.(1) A report of an assessment must be provided to the Chief Medical Officer –
- (a) in accordance with subsections (2) to (6); and
 - (b) no later than 21 days from the date of the appointment of an assessor under section 30(2).
- (2) The report must be in writing and must–

2018-04 **Lasting Powers of Attorney and Capacity**

- (a) set out the assessor's view as to the capacity and liberty matters;
- (b) state whether to the assessor's knowledge—
 - (i) an LPA has been conferred on any person by P under Part 2; or
 - (ii) the Court has appointed a deputy to act for P,

in relation to decisions as to P's personal welfare, or health and welfare, and if so identify the person or deputy concerned;

- (c) state whether to the assessor's knowledge P has made an advance decision under Part 3, and if so set out the terms of that decision;
- (d) identify any persons as are listed in section 33(6) who have been consulted or interviewed by the assessor, and summarise the views of such persons as to the capacity and liberty matters; and
- (e) subject to subsections (3) and (4), set out recommendations as to the nature and extent of any significant restrictions on P's liberty which, in all the circumstances, the assessor considers should be imposed.

(3) In forming a view as to the capacity and liberty matters and in making recommendations under subsection (2)(e), the assessor must consider whether any proposed restrictions on P's liberty are a proportionate response to—

- (a) the likelihood of P's suffering any harm; and
- (b) the seriousness of that harm, should it occur.

(4) In addition to the matters to be included in the report under subsection (2), a report may make such other recommendations in relation to P's care as appear to the assessor to be appropriate.

(5) Where P has made an advance decision, an assessor may not recommend the imposition of any significant restriction on P's liberty which would be incompatible with the terms of that decision.

(6) Where—

- (a) P is subject to guardianship under the Mental Health Act; and
- (b) the assessor forms the view, in considering the matter under section 33(7)(b), that it is necessary to impose a significant restriction on P's liberty,

the report must also state whether it is considered that the restriction is one which may lawfully be imposed by P's guardian.

(7) Where to the assessor's knowledge there are, in relation to P, no such persons as are listed in section 33(6), the report must contain a statement to this effect.

(8) Where the assessor has consulted or interviewed, in relation to P, any person listed in section 33(6)–

- (a) the assessor must inform that person of any recommendations made in relation to P; and
- (b) if the assessor recommends that a significant restriction be imposed on P's liberty which is incompatible with a view expressed by that person,

the assessor must explain in the report the specific reasons for that recommendation.

(9) A copy of the report must be provided to the Manager, and may be provided to P, at the same time as any authorisation based on the report, or, if no authorisation is given, as soon as reasonably practicable.

Effect of report.

35.(1) If the report of an assessment is negative, no standard authorisation may be granted under this Part, and no further assessment may be carried out unless–

- (a) the Manager or a member of the Care Agency designated with responsibility for P's care considers that a material change in P's circumstances justifies a fresh application for assessment, and the Manager or a member of the Care Agency designated with responsibility for P's care makes a request to the Chief Medical Officer accordingly;
- (b) the Manager or a member of the Care Agency designated with responsibility for P's care considers that an assessment of P was mistaken in a material respect and such person informs the Chief Medical Officer of the mistake; or
- (c) in the absence of a request under subsection (a), the Chief Medical Officer otherwise becomes aware of a material change in P's circumstances and considers that the change justifies a further assessment.

(2) A report which is not affirmative as to each of the capacity and liberty matters is described in this Part as negative, and a report is also negative if–

- (a) the assessment to which it relates did not enable the assessor to form a view as to the capacity and liberty matters; or

- (b) where P is a person subject to guardianship under the Mental Health Act, all of the significant restrictions on P's liberty which are recommended by the report may, in the assessor's view, lawfully be imposed by P's guardian.
- (3) For the purposes of this Part, a report is affirmative if in the assessor's view—
- (a) P lacks capacity in relation to giving consent to the arrangements for his care or treatment in the relevant place;
 - (b) it is necessary to impose, as a component of that care or treatment, a significant restriction on P's liberty in the interests of P's health or safety; and
 - (c) it is in P's best interests to be provided with care or treatment in circumstances where such a restriction will be imposed.

Record of assessments.

36. The Chief Medical Officer must keep, in such manner and for such period as may appear to him to be necessary, a record of—

- (a) all assessments carried out; and
- (b) all authorisations granted under this Part, together with copies of reports of all such assessments.

Standard authorisations.

37.(1) This section applies where the Chief Medical Officer is satisfied that—

- (a) an assessment of P has been duly completed in accordance with sections 33 and 34; and
- (b) the report of the assessment is affirmative.

(2) Where this section applies, the Chief Medical Officer may authorise the imposition of significant restrictions on P's liberty for a period of no longer than 12 months beginning with the date of the authorisation.

(3) As soon as practicable following an authorisation under subsection (2), the Chief Medical Officer must give notice in writing of the authorisation to the assessor and to the person who requested the assessment. Such authorisation must at least specify—

- (a) P's name;

- (b) the Manager's name and the name of any other registered person concerned;
 - (c) the date (or if applicable, the occurrence of such event) on which, and the period during which, the authorisation is to take effect;
 - (d) having regard to section 34(2)(e), the nature and extent of the significant restrictions on P's liberty which are permitted to be imposed by the authorisation; and
 - (e) any conditions or directions relating to the imposition of such restrictions.
- (4) Despite subsection (3)(d), the Chief Medical Officer may authorise significant restrictions to be imposed on P's liberty which are different, (whether in specific respects or by their nature), to any such restrictions as may have been recommended by the assessor.
- (5) Where the Chief Medical Officer considers it is in P's best interests to do so, the Chief Medical Officer may authorise a significant restriction which conflicts with a decision of–
- (a) a person on whom P has conferred an LPA under Part 2; or
 - (b) a deputy appointed by the Court;

but nothing in this section shall be taken to permit the Chief Medical Officer to authorise a significant restriction on P's liberty which conflicts or would conflict with a valid advance decision made by P under Part 3.

Rectification etc. of reports and recommendations.

- 38.(1) Where it appears to the Chief Medical Officer, the Manager or a member of the Care Agency designated with responsibility for P's care that the report of an assessment is incorrect or defective–
- (a) the error or defect in question may be rectified–
 - (i) by the Chief Medical Officer; or
 - (ii) with the consent of the Chief Medical Officer, by the assessor who made the report; and
 - (b) the report shall have effect, (and be deemed to have had effect), as though made originally without the error or defect.
- (2) Without prejudice to subsection (1), if it appears to the Chief Medical Officer that a recommendation in any report of an assessment is insufficient to warrant the imposition of a

2018-04 **Lasting Powers of Attorney and Capacity**

significant restriction on P's liberty, the Chief Medical Officer must as soon as reasonably practicable give notice in writing—

- (a) to the assessor, of the insufficiency; and
 - (b) to the Manager or member of the Care Agency designated with responsibility for P's care, of the fact that the recommendation is to be disregarded.
- (3) Where notice is given under subsection (2), the report which contained the recommendation shall nevertheless be deemed to be, (and always to have been), sufficient if—
- (a) a fresh recommendation made in accordance with section 34(2)(e) and which is not defective in any respect is provided to the Chief Medical Officer within the period of 14 days beginning with the date on which the notice was given; and
 - (b) that recommendation, taken together with any other recommendation relating to the same assessment, is sufficient to warrant the imposition of the significant restriction.

P to be notified of authorisation.

39.(1) As soon as practicable following the grant of any authorisation, the Manager must take all such steps as are reasonable to ensure that P understands—

- (a) the effect of the authorisation in relation to P, and in particular the nature and extent of the significant restriction on P's liberty which is authorised by it; and
 - (b) the rights of advocacy, support, representation and review which are available to P under this Act in respect of the authorisation.
- (2) As soon as practicable following a negative assessment or the termination of any authorisation, the Manager must take all such steps as are reasonable to ensure that P understands the effect of that assessment or (as the case may be) the termination.
- (3) The steps to be taken under subsections (1) and (2) include giving the information required by that subsection both in writing (and where appropriate, this may include giving to P a copy of the report of the relevant assessment) and orally, having regard to P's ability to understand that information, however given.
- (4) Subject to subsection (5), at the same time as or within a reasonable time of giving information to P under subsection (1) or (2), the Manager must also take all such steps as are reasonable to provide the same information to any person known to the Manager who is, in relation to P, a person such as listed in section 33(6).

(5) Where, at the time information is given to P under subsection (1) or (2), no ICA has been appointed in respect of P by the Chief Medical Officer under section 40, the information must be given to any advocate so appointed as soon as practicable following his appointment.

Independent capacity advocate to be appointed.

40.(1) This section applies where, in respect of P–

- (a) the report on an assessment contains a statement such as mentioned in section 34(7); and
- (b) a standard authorisation has been granted.

(2) Where this section applies the Chief Medical Officer must, as soon as practicable after granting the authorisation, nominate an ICA to represent P.

(3) The Chief Medical Officer must satisfy him or herself that any person to be nominated as an ICA under this section is a fit and proper person to be so nominated, in accordance with Part 6 and with any further provision made by regulations under that Part as to such nominations.

(4) The nomination of an ICA under this section–

- (a) shall be without prejudice to the continuing authority of any person on whom such authority has been conferred by P under an LPA or of any deputy appointed by the Court; and
- (b) shall continue for the duration of the authorisation, and if any vacancy arises the Chief Medical Officer must immediately appoint another person in accordance with this section and any regulations such as mentioned in subsection (3).

Renewal of standard authorisation.

41.(1) A standard authorisation may not be renewed except in accordance with this section.

(2) This section applies where, within the period of 28 days ending with the date on which, unless it were renewed, a standard authorisation would expire, the Manager considers that it is necessary to continue to impose a significant restriction on liberty authorised by the standard authorisation.

(3) Where this section applies the Manager must give notice requesting a renewal–

- (a) to the Chief Medical Officer, in such form as may be prescribed for the purpose; and

2018-04 **Lasting Powers of Attorney and Capacity**

- (b) no later than the end of the period mentioned in subsection (2).
- (4) Where the Chief Medical Officer receives a request duly made under subsection (3), the Chief Medical Officer must as soon as practicable appoint an assessor to carry out a further assessment of P (a “renewal assessment”).
- (5) Sections 33 to 40 shall apply to a renewal assessment as though references in those sections to an assessment were to a renewal assessment, except that section 33(7)(a) shall apply as though for the words “whether P lacks capacity” in that subsection there were substituted the words “whether P continues to lack capacity”.
- (6) If the report of a renewal assessment is affirmative, the Chief Medical Officer –
- (a) may, if satisfied that it is appropriate to continue the significant restriction on liberty, renew the standard authorisation; and
 - (b) may do so with or without variation, in accordance with any fresh recommendation made by the assessor under section 34(2)(e).

Standard authorisation: review by Manager or member of the Care Agency designated with responsibility for P’s care.

42.(1) Where a standard authorisation is in effect, the Manager must keep under review the necessity for the significant restriction on P’s liberty which it authorises.

(2) Subsection (3) applies if, at any time during the period for which a standard authorisation is in effect, it appears to the Manager that–

- (a) P has regained capacity in relation to the question of how his care should be provided, and does not consent to a restriction authorised by the standard authorisation; or
- (b) it is no longer–
 - (i) necessary in the interests of P’s health or safety, or
 - (ii) in P’s best interests, to continue to impose a restriction so authorised.

(3) Where this subsection applies, the Manager must cease to impose the significant restriction, and shall inform the Chief Medical Officer of that fact and of the date on which the restriction ceased to be imposed.

Continuity of authorisation: changes of place and in management.

43.(1) Where P is to be moved from the relevant place to which an authorisation (including an order of the Court) under this Part relates, (the “first relevant place”), to another relevant place (the “new place”), the Manager of the first relevant place must notify the Chief Medical Officer of the proposed change.

(2) Following notification under subsection (1), unless the Chief Medical Officer otherwise directs, the authorisation in question shall continue in effect as though for the first relevant place there were substituted the new place.

(3) Where one person ceases to be the Manager (the “original manager”) of a relevant place in relation to which an authorisation has effect, and a different person (the “new manager”) has that function, the change shall take effect as described in subsection (4).

(4) For the purposes of the authorisation and of this Part–

- (a) anything done by or in relation to the original manager in connection with the authorisation has effect as if done by or in relation to the new manager;
- (b) anything which is in the process of being done by or in relation to the original manager may be continued by or in relation to the new manager.

(5) The original manager does not cease to be liable for anything done in relation to the authorisation by the original manager prior to the substitution.

(6) The new manager shall only become liable for anything done in relation to the relevant authorisation from the date of the substitution onwards.

Review of authorisations by Tribunal.

44.(1) A request for a review of an authorisation may be made to the Tribunal–

- (a) in accordance with subsection (2);
- (b) by an application for the purpose made by–
 - (i) P, or a person who is listed in section 33(6) on behalf of P;
 - (ii) an ICA nominated to represent P under section 40;
 - (iii) the Minister; or
 - (iv) the Attorney General.

(2) During the period for which an authorisation is in effect, no more than one application may be made under subsection (1), whether by or on behalf of P.

- (3) The Chief Justice may by rules—
- (a) make further provision as to the form and manner of application to be made under subsection (1);
 - (b) make provision as to the conduct of proceedings before the Tribunal following receipt by the Tribunal of such an application; and
 - (c) without prejudice to subsections (4) or (5), make further provision as to the powers of the Tribunal in dealing with the application and carrying out its review.
- (4) Following receipt of a request under subsection (1), the Tribunal must review—
- (a) the standard authorisation;
 - (b) the reports of relevant assessments; and
 - (c) such other information as the Tribunal may consider relevant (including but not limited to, any matters as to which the Chief Justice may make provision under subsection (3)).
- (5) Following its review of the matters specified in subsection (4), the Tribunal must—
- (a) make a fresh determination as to the capacity and liberty matters; and
 - (b) determine—
 - (i) whether the significant restrictions on P’s liberty authorised by the standard authorisation should remain in effect, and
 - (ii) if so, for what period.
- (6) For the purposes of this section, the Tribunal may make orders—
- (a) amending or revoking an authorisation; and
 - (b) whether or not it considers that an authorisation should continue to have effect, directing the Chief Medical Officer to carry out such further assessments as the Tribunal considers necessary.

Monitoring of authorisations.

45.(1) The Chief Medical Officer may do all such things as are reasonably necessary for the purposes of monitoring—

- (a) the application and use of authorisations; and
- (b) the operation of significant restrictions on liberty authorised by them.

(2) In particular for the purpose mentioned in subsection (1), and without prejudice to the generality of that purpose, the Chief Medical Officer may require the Board, the Manager, or any registered person concerned to disclose to the Chief Medical Officer such information as may be considered necessary and relevant to the authorisation.

(3) The Minister may issue, and from time to time revise, a code of practice as to the operation of the provisions of this Part and as to records which must be kept in relation to such operation.

Powers of Court in relation to grant etc. of authorisations.

46.(1) Without prejudice to any other power conferred on the Court by this Act or any other enactment, or by its inherent jurisdiction, the Court may, if the conditions stated in subsection (2) are fulfilled, make an order authorising the imposition of a significant restriction on P's liberty.

- (2) The conditions mentioned in subsection (1), are—
 - (a) that P lacks capacity in relation to giving consent to the arrangements for his care or treatment; and
 - (b) that it is both necessary in the interests of P's health or safety, and in P's best interests, to impose significant restrictions on P's liberty.
- (3) An order of the Court under subsection (1), must state—
 - (a) P's name;
 - (b) the Manager's name, and the name of any registered person concerned;
 - (c) the period, (of no more than 18 months), during which the order is to have effect;
 - (d) the nature, extent and duration of the significant restrictions on P's liberty which are permitted to be imposed by the order, and by whom they may be imposed;
 - (e) any conditions or directions in relation to the imposition of any such significant restriction (in particular, but not limited to, directions as to the frequency of review); and
 - (f) the full grounds for the Court's decision.

(4) In its determinations as to the matters described in subsection (3)(c) to (e), the Court must have particular regard to the medical evidence available before it.

(5) The Court may authorise significant restrictions on P's liberty which differ from any such restrictions as may have been recommended under any other provision of this Part.

(6) Nothing in this section shall be taken to permit the Court to authorise a significant restriction on P's liberty which conflicts or would conflict with a valid advance decision made by P under Part 3.

(7) Where the Court considers it is in P's best interests to do so, the Court may authorise a significant restriction which conflicts with a decision of—

(a) a person on whom P has conferred an LPA under Part 2; or

(b) a deputy appointed by the Court.

(8) Sections 39 (P to be notified of authorisation), 40 (independent capacity advocate to be appointed), 43 (continuity of authorisation), 45 (monitoring of authorisation) and 49 (authorisation as authority to take and convey P) shall apply with all necessary modifications to an order of the Court under this section as they apply in relation to a standard authorisation.

Appeals.

47.(1) A party to any proceedings before the Tribunal may appeal to the Supreme Court on any point of law arising from a decision made by the Tribunal in those proceedings.

(2) An appeal may be brought under subsection (1) only if, on an application made by the party concerned, the Tribunal has given its permission for the appeal to be brought.

Temporary restriction of liberty for purpose of life-sustaining treatment.

48.(1) Notwithstanding the preceding provisions of this Part, a person ("T") may impose a significant restriction on P's liberty where the restriction is necessary in the interests of P's health or safety as described in subsection (2), for the duration of any treatment or act mentioned in that subsection.

(2) For the purposes of subsection (1), a restriction shall be considered to be necessary in the interests of P's health and safety if—

(a) the restriction is wholly or partly for the purpose of—

(i) giving P life-sustaining treatment; or

(ii) doing any act which T reasonably believes to be necessary to prevent a serious deterioration in P's condition; and

(b) the restriction is necessary in order to give that treatment or do that act.

Authorisation as authority to take and convey P.

49. An authorisation, (including an order of the Court), under this Part shall be sufficient authority, at any time within the period of 72 hours beginning with the time at which the authorisation is given—

(a) for the Manager or any other person authorised by the Manager for the purpose to take P and convey him or her to the relevant place; and

(b) for the Manager to admit P and detain him in the relevant place for such period as may be specified in the authorisation.

PART 6 – INDEPENDENT CAPACITY ADVOCATES

Application of this Part.

50. This Part applies to make provision for the appointment of ICAs—

(a) to represent and support any person lacking capacity in respect of certain decisions (“P”), as further provided by sections 53 (support where serious medical treatment is proposed) and 54 (support where provision of or change in accommodation is proposed);

(b) to carry out such other functions as are described in section 52 (functions of independent capacity advocates) and as provided by regulations made under that section; and

(c) for the purposes of Part 5 as provided by section 40.

Appointment of independent capacity advocates.

51.(1) The Minister may by regulations make such arrangements for the appointment of ICAs—

(a) as are in accordance with provision made by regulations and further described in subsections (2) and (3); and

(b) as the Minister, having regard to subsection (4), may consider reasonable.

(2) Regulations under subsection (1), may in particular make provision including, (but not limited to), provision—

2018-04 **Lasting Powers of Attorney and Capacity**

- (a) as to the qualifications to be required of persons who may be appointed;
 - (b) as to the procedure for appointment and terms and conditions of appointment;
 - (c) requiring the Chief Medical Officer to report to the Board on any concerns arising from the dealings between P and P's ICA;
 - (d) as to the circumstances in which the appointment may end or be terminated and the formalities for doing so; and
 - (e) as to the nature and level of payments (whether by way of fees, or reimbursement of expenses) which may be made to advocates.
- (3) For the purpose of enabling advocates to carry out their functions, regulations may further make provision as to the powers of advocates—
- (a) to interview P and any other of P's representatives; and
 - (b) to examine and take copies of any documents, records or other information kept by the Chief Medical Officer, the Board or the Manager of a relevant place, which may be relevant to the exercise of a function by an ICA.
- (4) In making arrangements under subsection (1), the Chief Medical Officer must have regard to the principle that P should, so far as practicable, be represented and supported by a person who is independent of any person who is responsible for a proposed act or decision relating to P.

Functions of independent capacity advocates.

52. The functions to be carried out by ICAs include (but are not limited to)—

- (a) providing support to P so that P may participate as fully as possible in any decision concerning P or P's best interests;
- (b) obtaining and evaluating information in relation to representing and supporting P and P's best interests;
- (c) ascertaining what, if P had capacity, would be P's wishes and feelings in relation to particular matters, or would be the beliefs and values likely to influence P;
- (d) obtaining further medical opinion about proposed medical treatment of P; and
- (e) ascertaining what courses of action may be available in relation to P, in addition or in the alternative to any such proposed treatment.

Support where serious medical treatment is proposed.

53.(1) This section applies where—

- (a) the Manager proposes to provide, or secure the provision of, serious medical treatment for P;
- (b) P lacks capacity to consent to the proposed treatment; and
- (c) the Manager is satisfied that there is no person, other than one engaged in a professional capacity or for remuneration in providing care or treatment for P, whom it would be appropriate to consult in determining whether the proposed treatment would be in P's best interests.

(2) Where this section applies, the Manager must, subject to subsection (3), instruct an ICA to represent P before the proposed treatment may be provided.

(3) If, in the opinion of the Manager, the proposed treatment needs to be provided as a matter of urgency, it may be provided even though the requirement in subsection (2) has not been fulfilled.

(4) In providing or securing the provision of treatment for P, the Manager must take into account any information given or submissions made on behalf of P by the ICA instructed under subsection (2).

(5) For the purposes of this section “serious medical treatment” means treatment of a kind which involves providing, withholding or withdrawing treatment in circumstances where—

- (a) in a case where a single treatment is proposed, there is a fine balance between the potential benefit to P of such treatment and the burdens and risks it is likely to entail;
- (b) in a case where there is a choice of treatments, a decision as to which treatment to use is finely balanced; or
- (c) the proposed treatment would be likely to involve serious consequences for P.

(6) The Minister may by regulations amend the definition in subsection (5).

(7) This section does not apply if P's treatment is regulated by Part 3 (consent to treatment) of the Mental Health Act.

Support where provision of or change in accommodation is proposed.

2018-04 **Lasting Powers of Attorney and Capacity**

54.(1) This section applies where the Manager proposes to make arrangements–

- (a) for the provision of accommodation for P in a Hospital, or a Care Home (including a change to any existing provision of accommodation for P);
- (b) P lacks capacity to consent to such arrangements; and
- (c) the Manager is satisfied that there is no person, other than one engaged in a professional capacity or for remuneration in providing care or treatment for P, whom it would be appropriate to consult in determining whether the proposed arrangements would be in P's best interests.

(2) This section does not apply–

- (a) where P is accommodated as a result of an obligation imposed under the Mental Health Act; or
- (b) where P is a person in respect of whom section 40 applies.

(3) Where this section applies, the Manager must instruct an ICA to represent P before making the proposed arrangements, unless–

- (a) the accommodation is likely to be provided for a continuous period which is less than the applicable period; or
- (b) the proposed arrangements need to be made as a matter of urgency.

(4) If either of the grounds in subsection (3)(a) or (b) apply, but the Manager subsequently has reason to believe that the accommodation is likely to be provided for a continuous period–

- (a) beginning with the day on which accommodation is first provided in accordance with the proposed arrangements; and
- (b) ending on or after the expiry of the applicable period,

the Manager must instruct an ICA to represent P.

(5) In making arrangements for P's accommodation or a change in P's accommodation, the Manager must take into account any information given or submissions made on behalf of P by the ICA instructed under subsection (3) or (4).

(6) For the purposes of this section the “applicable period” means–

- (a) in relation to accommodation in a Hospital, 28 days; and

- (b) in relation to accommodation in a Care Home, 8 weeks.

PART 7 - MISCELLANEOUS

Protection for acts done in pursuance of this Act.

55.(1) No person shall be liable, whether on the ground of want of jurisdiction or on any other ground, to any civil or criminal proceedings to which he would have been liable apart from this section in respect of any act purporting to be done in pursuance of this Act or any regulations or rules made under this Act, unless the act was done in bad faith or without reasonable care.

(2) No civil proceedings shall be brought against any person in any court in respect of any such act without the leave of the Supreme Court and no criminal proceedings shall be brought against any person in any court in respect of any such act except by or with the consent of the Attorney General.

Regulations.

56.(1) The Minister may make regulations prescribing all matters, which by this Act, are required or permitted to be prescribed, or which are necessary or convenient to be prescribed for carrying out or giving effect to the provisions of this Act.

(2) Without prejudice to the generality of subsection (1), regulations may provide for—

- (a) the consequential amendment of any enactment; and
- (b) giving full effect in Gibraltar to any international agreement concerning the protection of adults.

Amendments to the Mental Health Act 2016.

57. The amendments to the Mental Health Act 2016 at Schedule 1 shall have effect.

Consequential amendments and transitional provisions.

58.(1) The consequential provisions at Schedule 2 shall have effect.

(2) The Minister may by regulations make any supplementary, incidental, consequential, transitional or saving provisions for the purposes of, in consequence of, or for giving full effect to a provision of this Act.

(3) In respect of a person who on the commencement date—

- (a) is residing at a relevant place; and

(b) fulfils the conditions set out in section 32(2),

Part 5 shall apply as if a standard authorisation had been granted in respect of him for a period of 12 months commencing on the commencement date.

(4) For the purposes of this section, “commencement date” means the date of the coming into force of this Act and where different dates are appointed for different provisions, it shall be construed as a reference to the date on which that provision comes into operation.

Amendments to the Medical (Gibraltar Health Authority) Act, 1987 and the Care Agency Act 2009.

59. The amendments to the Medical (Gibraltar Health Authority) Act, 1987 and the Care Agency Act 2009 at Schedule 3 shall have effect.

SCHEDULE 1

Section 57

AMENDMENTS TO THE MENTAL HEALTH ACT 2016

1. The Mental Health Act 2016 is amended in accordance with the provisions in this Schedule.
2. In sections 25(3), 25(7) and 26(4) delete “, unless they discharge the patient under section 32,”.
3. In section 32(4)-
 - (a) in paragraph (a) delete “, the Authority”;
 - (b) in paragraph (b) delete “, by the Care Agency”; and
 - (c) in paragraph (c) delete “, by the Authority”.
4. In section 44(3)-
 - (a) delete the “or” after the semi-colon in paragraph (b) and insert “or” after the semi-colon in paragraph (c); and
 - (b) insert the following paragraph after paragraph (c)-
 - “(d) he has been conditionally discharged under section 117(5A) or section 98 or 99 and he is not recalled to hospital.”.
5. For section 53 substitute-
 - “53.(1) In respect of any medical treatment given to a patient for the mental disorder from which he is suffering, not being a form of treatment specified in section 45(1), 46(1) or 47(1), the consent of a patient shall, wherever practicable, be sought, and the patient’s consent, refusal to consent, or a lack of capacity to give consent should be recorded.
 - (2) The consent of a patient shall not be required for medical treatment given to him in the circumstances set out in section 51 if the treatment is given by or under the direction of the approved clinician in charge of the treatment.”.
6. In section 85 insert the following subsection after subsection (2)-
 - “(3) Nothing in this Part authorises anyone-

2018-04 **Lasting Powers of Attorney and Capacity**

- (a) to give a patient medical treatment for mental disorder; or
- (b) to consent to a patient's being given medical treatment for mental disorder;

if at the time when it is proposed to treat the patient, his treatment is regulated by Part 3 of this Act.”.

7. In section 91(1)(g) and (h) delete “and the patient is not discharged under section 32”.

8. For section 98 substitute-

“98.(1) Where an application to the Tribunal is made by a patient subject to a hospital order, or where the case of such a patient is referred to the Tribunal, the Tribunal shall direct the absolute discharge of the patient if-

- (a) the Tribunal is not satisfied as to the matters mentioned in paragraph (b)(i),(ii) or (iii) of section 97(1); and
- (b) the Tribunal is satisfied that it is not appropriate for the patient to remain liable to be recalled to hospital for further treatment.

(2) Where in the case of any such patient as is mentioned in subsection (1)-

- (a) paragraph (a) of that subsection applies; but
- (b) paragraph (b) of that subsection does not apply,

the Tribunal shall direct the conditional discharge of the patient.

(3) Where a patient is absolutely discharged under this section he shall thereupon cease to be liable to be detained by virtue of the relevant hospital order.

(4) Where a patient is conditionally discharged under this section-

- (a) he may be recalled under section 117(5B) as if he had been conditionally discharged under that section; and
- (b) the patient shall comply with such conditions (if any) as may be imposed at the time of the discharge by the Tribunal or at any subsequent time by the Minister with responsibility for justice.

(5) The Minister with responsibility for justice may, upon the recommendation of the responsible clinician, from time to time vary any condition imposed (whether by the Tribunal or by him) under subsection (4).”.

9. In section 99-

(a) for subsection (1) substitute-

“(1) Where an application to the Tribunal is made by a patient who is subject to a transfer direction, or where the case of such a person is referred to the Tribunal, the Tribunal-

(a) shall notify the Minister with responsibility for justice whether, in its opinion, the patient would, if subject to a hospital order, be entitled to be absolutely or conditionally discharged under section 98; and

(b) if the Tribunal notifies him that the patient would be entitled to be conditionally discharged, may recommend that in the event of his not being discharged under this section he should continue to be detained in hospital.”;

(b) in subsection (2)(a) insert “or conditionally” after “absolutely”;

(c) in subsection (2) insert “or, as the case may be, the conditional” after “absolute”;

(d) in subsection (3) after “shall” insert “,unless the Tribunal has made a recommendation under subsection (1)(b),”

(e) in subsection (4)-

(i) after “absolutely” insert “or conditionally”; and

(ii) after “shall” insert “,unless the Tribunal has made a recommendation under subsection (1)(b),”.

10. After section 99 insert the following section-

“Applications and references concerning conditionally discharged patients.

99A.(1) Where a patient who is subject to a hospital order or transfer direction has been conditionally discharged under section 117(5A), 98 or 99 and is subsequently recalled to hospital-

(a) the Minister with responsibility for justice shall, within one month of the day on which the patient returns or is returned to hospital, refer his case to the Tribunal; and

(b) section 95 shall apply to the patient as if the relevant hospital order or transfer direction had been made on that day.

- (2) Where a patient has been conditionally discharged as aforesaid but has not been recalled to hospital he may apply to the Tribunal-
- (a) in the period between the expiration of 12 months and the expiration of two years beginning with the date on which he was conditionally discharged; and
 - (b) in any subsequent period of two years.”.
11. Section 117 is amended–
- (a) in subsection (3) by substituting “Part 2” for “Part 3”; and
 - (b) inserting the following subsections after subsection (5)-
- “(5A) The Minister with responsibility for justice may, on the recommendation of the responsible clinician, by warrant discharge a patient to whom this section applies either absolutely or subject to conditions; and where a person is absolutely discharged under this subsection, he shall thereupon cease to be liable to be detained by virtue of the relevant hospital order or transfer direction.
- (5B) In respect of a patient who has been conditionally discharged, the Minister with responsibility for justice may at any time recall the patient to hospital and if a patient is recalled he shall be treated for the purposes of section 24 as if he had absented himself without leave from hospital.”.
12. Section 131 is amended by inserting the following subsections after subsection (2)-
- “(3) The Minister may, by regulation, set fees that may be charged by an institution within subsection (5) having the care of mentally disordered persons.
 - (4) Regulations made under subsection (3) may provide for-
- (a) the exercise of the discretion to charge fees;
 - (b) the practice and procedure for disclosure or declaration of the mentally disordered person’s finances;
 - (c) the manner in which any payments should be made to the institution having the care of the mentally disordered person and how it is to be administered for the benefit such person;
 - (d) the amount to be charged for different descriptions of services;

- (e) a cap on the charges that can be made under this section which may be set by means of a set amount or formula based on means;
 - (f) any exemptions in full or in part to be applied to any charges made under this section; and
 - (g) any other matters which are necessary or convenient to be prescribed for giving effect to the charging or recovery of fees under subsection (3).
- (5) An institution is within this subsection if-
- (a) it is under the control of a Government Department, statutory Authority, Agency or entity; and
 - (b) it is prescribed, for the purposes of this section, by the Minister, by notice in the Gazette.”.

SCHEDULE 2

Section 58

CONSEQUENTIAL AMENDMENTS

1. The Mental Health Act 2016 is amended in accordance with the provisions in this Schedule.

2. In section 47-

(a) in subsection (5) for paragraph (c) substitute the following-

“(c) that giving him the treatment would not conflict with-

(i) an advance decision which the registered medical practitioner concerned is satisfied is valid and applicable;

(ii) a decision made by a donee or deputy or by the Court of Protection.”.

(b) for subsection (9) substitute the following-

“(9) In this section-

(a) a reference to an advance decision is to an advance decision (within the meaning of the Lasting Powers of Attorney and Capacity Act 2018) made by the patient;

(b) “valid and applicable”, in relation to such a decision, means valid and applicable to the treatment in question in accordance with section 21 of that Act;

(c) a reference to a donee is to a donee of an LPA (within the meaning of that Act) created by the patient, where the donee is acting within the scope of his authority and in accordance with that Act; and

(d) a reference to a deputy is to a deputy appointed for the patient by the Court of Protection under Part 5 of this Act, where the deputy is acting within the scope of his authority and in accordance with that Part.”

3. In section 55(3)(b) insert “a donee or” before “a deputy”.

4. In section 56(2)(b) insert “a donee or” before “a deputy”.

5. In section 57 for subsection (6) substitute the following subsections-

- “(6) The fifth condition is that giving the treatment does not conflict with-
- (a) an advance decision which he is satisfied is valid and applicable; or
 - (b) a decision made by a donee or a deputy or the Court of Protection.
- (7) In this section-
- (a) reference to an advance decision is to an advance decision (within the meaning of the Lasting Powers of Attorney and Capacity Act 2018) made by the patient; and
 - (b) “valid and applicable”, in relation to such a decision, means valid and applicable to the treatment in question in accordance with section 21 of that Act.”.
6. In section 63–
- (a) renumber the second subsection (4) as subsection (5); and
 - (b) insert a new subsection (6) as follows-
- “(6) References to a donee are to a donee of an LPA (within the meaning of the Lasting Powers of Attorney and Capacity Act 2018) created by the patient, where the donee is acting within the scope of this authority and in accordance with that Act.”.
7. In section 70(3) –
- (a) remove the “or” at the end of paragraph (b);
 - (b) replace the full stop at the end of paragraph (c) with a “; and”; and
 - (c) insert the following paragraph after paragraph (c)-
- “(d) the making of a decision on behalf of P which is inconsistent with a decision made, within the scope of his authority and in accordance with the Lasting Powers of Attorney and Capacity Act 2018, by the donee of an LPA granted by P (or, if there is more than one donee, by any of them).”.
8. In section 89-
- (a) in subsection (7) remove the “and” at the end of paragraph (a);

2018-04 **Lasting Powers of Attorney and Capacity**

(b) in subsection (7) replace the comma at the end of paragraph (b) with “; and” and insert the following paragraphs after paragraph (b)–

“(c) any donee of an LPA granted by the person;

(d) any deputy appointed for the person by the Court,”;

(c) in subsection (8) insert “are exercisable under an LPA or” after “exercise of any powers which”;

(d) after subsection (11) insert the following subsection–

“(12) “LPA” and “donee” shall have the meaning given in the Lasting Powers of Attorney and Capacity Act 2018.”.

SCHEDULE 3

Section 59

**AMENDMENTS TO THE MEDICAL (GIBRALTAR HEALTH AUTHORITY) ACT,
1987 AND THE CARE AGENCY ACT 2009**

1. The Medical (Gibraltar Health Authority) Act, 1987 is amended by inserting the following section after section 7-

“Power to charge for residential services for the elderly.

7A.(1) The Government may, by regulation, set fees that may be charged by the Authority, or an institution or other entity under the control of the Authority, for the provision of residential services for the elderly.

(2) Regulations under subsection (1) may provide for-

- (a) the exercise of the discretion to charge fees;
- (b) the practice and procedure for disclosure or declaration of the finances of the person in residential care;
- (c) the manner in which any payments should be made to the Authority or the institution or other entity having the care of the person and how it is to be administered for the benefit of the person;
- (d) the amount to be charged for different descriptions of services;
- (e) a cap on the charges that can be made under this section which may be set by means of a set amount or formula based on means;
- (f) any exemptions in full or in part to be applied to any charges made under this section; and
- (g) any other matters which are necessary or convenient to be prescribed for giving effect to the charging or recovery of fees under subsection (1).”

2. The Care Agency 2009 is amended by inserting the following section after section 7-

“Power to charge for residential services.

“7A.(1)The Government may, by regulation, set fees that may be charged by the Agency, or an institution or other entity under the control of the Agency, for the provision of residential services.

- (2) Regulations under subsection (1) may provide for-
- (a) the exercise of the discretion to charge fees;
 - (b) the practice and procedure for disclosure or declaration of the finances of the person in residential care;
 - (c) the manner in which any payments should be made to the Agency or the institution or other entity having the care of the person and how it is to be administered for the benefit of the person;
 - (d) the amount to be charged for different descriptions of services;
 - (e) a cap on the charges that can be made under this section which may be set by means of a set amount or formula based on means;
 - (f) any exemptions in full or in part to be applied to any charges made under this section; and
 - (g) any other matters which are necessary or convenient to be prescribed for giving effect to the charging or recovery of fees under subsection (1).”