

THE STATES OF DELIBERATION
of the
ISLAND OF GUERNSEY

**THE CAPACITY (COMMENCEMENT AND MISCELLANEOUS PROVISIONS) (GUERNSEY
AND ALDERNEY) ORDINANCE, 2025**

The States are asked to decide:-

Whether they are of the opinion to approve the draft Ordinance entitled "The Capacity (Commencement and Miscellaneous Provisions) (Guernsey and Alderney) Ordinance, 2025" and to direct that the same shall have effect as an Ordinance of the States.

EXPLANATORY MEMORANDUM

This Ordinance commences Parts 5 and 6 (and other Parts relevant to their operation) of the Capacity (Bailiwick of Guernsey) Law, 2010 ("the Law") which relate to the making of advanced decisions to refuse treatment and advance care plans, respectively.

The commencement of Part 5 will allow a person with capacity to make a legally-binding decision to refuse medical treatment at a time when they do not have capacity to refuse (e.g. when unconscious or living with dementia, etc.).

The commencement of Part 6 will allow a person with capacity to make a formal document setting out how they would like to be treated when they no longer have capacity (e.g. where they live, any interests that they would like to pursue, any beliefs which are important to them) or have died (e.g. funeral arrangements) which must be taken into account by decision makers, such as attorneys under a lasting power of attorney or a carer.

The Ordinance also commences the offence of ill treatment or neglect of a person under guardianship or in relation to whom a Lasting Power of Attorney has been activated, as well as several other technical provisions in anticipation of the introduction of the Protective Authorisation Scheme in Part 8 of the Law.

In addition, the Ordinance makes technical and consequential amendments to various enactments (including the Law) in anticipation of the commencement of the remainder of the Law, clarifies the effect of the Court of Appeal (Guernsey) Law, 1961 in relation to appeals from the Royal Court and gives the Committee a general to prescribe forms for the purposes of the Law.

Finally, the Ordinance amends the Capacity (Lasting Powers of Attorney) (Bailiwick of Guernsey) Ordinance, 2022 ("the 2022 Ordinance") to clarify the position where the grantor has not made their intentions clear in relation to replacement attorneys and to allow the Committee, when investigating for the purposes of the 2022 Ordinance, to

require any person who it reasonably believes may have relevant information or documentation to provide them for the purposes of the investigation.

The Capacity (Commencement and Miscellaneous Provisions) (Guernsey and Alderney) Ordinance, 2025

ARRANGEMENT OF SECTIONS

1. Commencement of the Law.
2. Amendments.
3. Appeals.
4. Forms.
5. Amendments to the Lasting Powers of Attorney Ordinance.
6. Key interpretative provision.
7. Interpretation.
8. Extent.
9. Citation.
10. Commencement.

SCHEDULE:

Part I - Amendments

Part II – Further amendments

Part III - Amendments to Lasting Powers of Attorney Ordinance

The Capacity (Commencement and Miscellaneous Provisions) (Guernsey and Alderney) Ordinance, 2025

THE STATES, in pursuance of their Resolutions of the 16th March, 2016^a and the 26th February, 2020^b, and in exercise of the powers conferred on them by sections 1(5), 23, 72, 78(1), 79 and 85 of the Capacity (Bailiwick of Guernsey) Law, 2020^c, and all other powers enabling them in that behalf, hereby order:-

Commencement of the Law.

1. The following provisions of the Law shall come into force on 8th May 2025 -

(a) only to the extent relevant for the bringing into force, and operation, of the provisions set out in paragraphs (b) to (e) -

(i) Parts 1 and 2, and

(ii) Part 3 (except sections 17 to 20),

(b) Parts 5 and 6,

(c) section 71A,

^a Article III of Billet d'État No. VII (Vol. II) of 2016.

^b Article VI of Billet d'État No. V of 2020.

^c Order in Council No. II of 2021; this enactment has been amended.

(d) section 75 (except subsection (1)(b)(i)), and

(e) for all purposes, section 77.

Amendments.

2. (1) The amendments set out in Part I of the Schedule to this Ordinance shall have effect.

(2) The amendments set out in Part II of the Schedule to this Ordinance shall have effect.

Appeals.

3. For the avoidance of doubt -

(a) section 14 of the Court of Appeal (Guernsey) Law, 1961^d shall have effect in relation to any judgment or order of the Royal Court (including any declaration) made under the Law,

(b) any such appeal may only be made with the leave of the Royal Court or the Court of Appeal,

(c) an application for leave to appeal under subsection (1) shall be treated, for the purposes of section 21 of the Court of Appeal (Guernsey) Law, 1961, in respect of -

^d Ordres en Conseil Vol. XVIII, p. 315; this enactment has been amended.

(i) the powers that may be exercised by a single judge of the Court under section 21(1) of that Law, and

(ii) the entitlement of an applicant under section 21(2) of that Law,

as if it were an application made under Part II of that Law.

Forms.

4. The Committee may prescribe such forms as it sees fit in relation to any matter for the purposes of the Law.

Amendments to the Lasting Powers of Attorney Ordinance.

5. The amendments set out in Part III of the Schedule to this Ordinance shall have effect.

Key interpretative provision.

6. In section 1(1) of the Law, after the definition of "guardian", insert -

""Guernsey" includes Herm and Jethou,".

Interpretation.

7. In this Ordinance, "the Law" means the Capacity (Bailiwick of Guernsey) Law, 2020, and all other terms used in this Ordinance shall have the same meaning as set out in the Law, unless the contrary intention requires.

Extent.

8. (1) This Ordinance (except sections 2(2), 5, 6 and 7, and Parts II and III of the Schedule) shall have effect in Guernsey, Alderney, Herm and Jethou.

(2) Sections 2(2), 5, 6 and 7 of, and Parts II and III of the Schedule to, this Ordinance shall have effect throughout the Bailiwick of Guernsey.

Citation.

9. This Ordinance may be cited as the Capacity (Commencement and Miscellaneous Provisions) (Guernsey and Alderney) Ordinance, 2025.

Commencement.

10. This Ordinance shall come into force on the 8th May, 2025.

SCHEDULE

Sections 2 and 5

PART I

AMENDMENTS

1. In section 27(1) of the Liquor Licensing Ordinance, 2006, delete "medically".

2. In the Law -

(a) in section 37 -

(i) after subsection (5), insert the following subsection –

"(5A) For the avoidance of doubt, an advance decision made under Part 5 of the Law shall not have effect in relation to medical treatment (as defined by section 2 of the Mental Health (Bailiwick of Guernsey) Law, 2010) provided to a person in accordance with Part VIII of that Law, unless it is provided in accordance with Part II of the Mental Health (Miscellaneous Provisions) (Guernsey and Alderney) Ordinance, 2013." , and

(ii) re-number the subsection following the inserted subsection as subsection (6), and

(b) in section 72(1)(c), for "and", substitute "or".

3. For section 3(b) of the Mental Health (Miscellaneous Provisions) (Guernsey and Alderney) Ordinance, 2013^e, substitute the following paragraph -

"(b) **"advance decision"** means either -

- (i) an advance decision made in accordance with section 8, or
- (ii) a valid and applicable advance decision to refuse treatment for the purposes of Part 5 of the Capacity (Bailiwick of Guernsey) Law, 2020, and".

PART II

FURTHER AMENDMENTS

4. Section 40 of the Mental Health (Bailiwick of Guernsey) Law, 2010^f is amended as follows –

- (a) in the section heading, after "Mental Health", insert "and Capacity",

^e Ordinance No. XVI of 2013; this enactment has been amended.

^f Order in Council No. XV of 2011; this enactment has been amended.

- (b) in subsection (1), after "Mental Health", insert "and Capacity", and
- (c) in subsection (5), after "Mental Health", insert "and Capacity".

5. The Law is amended as follows -

- (a) in section 47 –
 - (i) in subsection (2), after "is prevented", insert "or would be prevented", and
 - (ii) in subsection (3) -
 - (A) in paragraph (c), for ".", substitute ",", and
 - (B) after paragraph (c), insert the following paragraphs -
 - "(d) a significant restriction does not occur where P is lawfully detained -
 - (i) pursuant to an order of a Bailiwick court of competent jurisdiction, or
 - (ii) pursuant to any enactment, and

- (e) a significant restriction does not occur where the restriction on P's movement is a commonly occurring restriction on movement, which includes a restriction as a result of P's medical condition and any treatment being received for that condition (which may include life-saving medical treatment and, in relation to any type of medical treatment, sedation), where that treatment would not be materially different than that given to a person of sound mind, and, for the purposes of this paragraph, "**treatment**" should be given its widest possible meaning.",
- (b) in section 55 (a) -
 - (i) delete ", including",
 - (ii) after "valid" insert "and applicable", and
 - (iii) for "or" substitute "and",
- (c) in section 68(1) for "assessment", substitute "authorisation",
- (d) after section 71, insert the following section -

"Acts done for the purpose of a protective authorisation."

71A. (1) Subject to subsection (2), a person ("**D**") does not incur any liability in relation to any act in relation to a protective authorisation that D would not have incurred if the person in relation to whom the act was taken ("**P**") had -

(a) had capacity to consent in relation to the act, and

(b) consented to D's doing the act.

(2) Nothing in this section -

(a) excludes D's civil liability for loss or damage, or D's criminal liability, resulting from D's negligence in doing the act,

(b) authorises D to do anything otherwise than for the purpose of a protective authorisation that is in force, or

(c) authorises D to do anything which does not comply with a protective authorisation (or any conditions included in that authorisation).", and

(e) in section 77, after the words "where it is", insert "in".

PART III

AMENDMENTS TO LASTING POWERS OF ATTORNEY ORDINANCE

5. The Capacity (Lasting Powers of Attorney) (Bailiwick of Guernsey)

Ordinance, 2022^g is amended as follows –

- (a) After section 7, insert the following section -

"Provisions regarding replacement attorneys.

7A. (1) Where a grantor has -

- (a) originally appointed a single attorney, and
- (b) chosen more than one replacement attorney,
but
- (c) not stated in the relevant instrument –
 - (i) whether all or, if not, which of the replacement attorneys will replace a sole attorney,
 - (ii) if more than one replacement attorney replaces a previously appointed attorney, on what basis the replacement attorneys will act, or
 - (iii) where not all of the replacement attorneys replace the sole attorney, the number or order of any replacement attorneys thereafter,

^g Ordinance No. IX of 2022.

subsection (2) shall, unless the grantor has demonstrated sufficient contrary intention, have effect.

(2) Where this subsection applies, the lasting power of attorney shall have effect as if the grantor stated in the relevant instrument (as the case may be) that -

(a) in relation to subsection (1)(c)(i), the first named replacement attorney shall replace the sole attorney,

(b) in relation to subsection (1)(c)(ii) -

(i) the replacement attorneys shall act with any previously appointed attorney on the same basis as that attorney was permitted to act previously, or

(ii) where the previously appointed attorney was a sole attorney, the replacement attorneys shall act on a joint and several basis,

(c) in relation to subsection (1)(c)(iii), the replacement attorneys shall replace any previous attorneys in numerical order as they are set out in the relevant instrument."

(b) After section 9(8), insert the following subsection –

"(9) For the purposes of this section (except subsection (8)), where the Committee is investigating the matters set out in any of the following sections –

(a) section 3(5)(a),

(b) section 4(6)(a),

(c) section 5(4)(a),

(d) section 7(4)(a), or

(e) section 7(20)(a),

"A" shall also be taken to include any person who the Committee reasonably believes may have information or documentation of assistance in the investigation of those matters."

(c) After section 9, insert the following section -

"Protection from self-incrimination."

9A. Where a person makes a statement, or provides information or documentation, in response to a requirement imposed by or under section 9 of this Ordinance ("**the relevant statement**"), the relevant statement -

(a) may be used in evidence against the person in

proceedings other than criminal proceedings, and

(b) may not be used in evidence against the person in criminal proceedings except –

(i) where evidence relating to the relevant statement is adduced, or a question relating to the relevant statement is asked, in the proceedings by or on behalf of that person,

(ii) in proceedings for an offence under section 9(6) (making of false, deceptive or misleading statement, etc.),

(iii) in proceedings for perjury or perverting the course of justice, or

(iv) in proceedings where, in giving evidence, that person makes a statement inconsistent with the relevant statement, but in this case the relevant statement is only admissible to the extent necessary to establish the inconsistency.",

(d) After section 19, insert the following section -

"Deeming of attorney to act as trustee, etc. for purposes of enactments.

19A. Where any enactment requires any person to make an application for the appointment of a trustee, guardian or legal representative

to act on behalf of a person who lacks capacity to do any thing, a person who is an attorney under a lasting power of attorney –

- (a) relating to health and welfare matters or property and financial affairs matters, depending on the nature of the thing which the person lacks the capacity to do, and
- (b) which has been created and activated in accordance with Part 4 of the Law,

shall be deemed to have been so appointed on the same basis as that person has been appointed as an attorney under that lasting power of attorney.".