

PROJET DE LOI

ENTITLED

The Capacity (Bailiwick of Guernsey) Law, 2020 *

[CONSOLIDATED TEXT]

NOTE

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* No. II of 2021; as amended by the: Capacity (Lasting Powers of Attorney) (Bailiwick of Guernsey) Ordinance, 2022 (No. ** of 2022). See also the Children (Consequential Amendments etc.) (Guernsey and Alderney) Ordinance, 2009 (No. VII of 2010).

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THE STATES, in pursuance of their Resolution of the 16th March, 2016^a, of the 27th February, 2020^b and of the 22nd April, 2020^c, have approved the following provisions which, subject to the Sanction of Her Most Excellent Majesty in Council, shall have force of law throughout the Bailiwick of Guernsey.

PART 1

PRELIMINARY

Key interpretative provisions.

1. (1) In this Law, and in any Ordinance or subordinate legislation made under this Law, unless the context otherwise requires –

"advanced care plan" has the meaning given in section 39,

"advance decision" has the meaning given in section 35(1),

"attorney", in relation to a lasting power of attorney, has the meaning given in section 22,

"Bailiwick" means the Bailiwick of Guernsey,

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 Article VII of Billet d'Etat No. X of 2020.

"bankrupt" means –

- (a) that a declaration of insolvency has been made in respect of a person by the Royal Court under the Loi ayant rapport aux Débiteurs et à la Renonciation, 1929^d,
- (b) that a Commissioner or Committee of Creditors has been appointed by the Royal Court under that Law to supervise or secure a person's estate,
- (c) that a person's affairs have been declared to be in a state of "désastre" at a meeting of that person's arresting creditors held before a Commissioner of the Royal Court,
- (d) that an interim vesting order has been made against a person in respect of any of that person's real property in the Bailiwick, or
- (e) that a composition, compromise or arrangement with creditors has been entered into in respect of a person whereby that person's creditors will receive less than 100 pence in the pound,
- [(f) that an event, measure or procedure has occurred outside the Bailiwick in relation to the individual which corresponds as nearly as may be to any event, measure

^d Ordres en Conseil Vol. VIII, p. 310.

or procedure described in paragraphs (a) to (e),]

"Capacity Professional" has the meaning given in section 48,

"Chief Pleas" means the Chief Pleas of Sark,

"Committee" means the States of Guernsey Committee for Health and Social Care,

[**"dispose of"**, for the purposes of section 27(1), means dealing with the real property by way of any legal transaction specified in an Ordinance made under section 23, and **"disposal"** shall be construed accordingly,]

[**"full fiduciary licence"**, for the purposes of the Regulation of Fiduciaries, Administration Businesses and Company Directors, etc. (Bailiwick of Guernsey) Law, 2000, includes a primary or secondary fiduciary licence for the purposes of the Regulation of Fiduciaries, Administration Businesses and Company Directors, etc. (Bailiwick of Guernsey) Law, 2020,]

"grantor", in relation to a lasting power of attorney, has the meaning given in section [22],

"guardian" means a curateur, tuteur or other guardian,

"health record" has the meaning given in section 92 of the Data Protection (Bailiwick of Guernsey) Law, 2017,

"the Human Rights Convention" has the same meaning as **"the Convention"** in the Human Rights (Bailiwick of Guernsey) Law, 2000^e,

^e Order in Council No. XIV of 2000; as amended by No. I of 2005; Ordinance

"ICR" has the meaning given in section 41,

"Island authority" means the States of Guernsey, the States of Alderney or the Chief Pleas of Sark, and includes any committee thereof,

"lasting power of attorney" has the meaning given in section [22],

"life-sustaining treatment" means treatment which in the view of a person providing health care for the person concerned is necessary to sustain life,

"Mental Health Law" means the Mental Health (Bailiwick of Guernsey) Law, 2010^f,

"P's representative" has the meaning given in section 71,

"parental responsibility" has the same meaning as in section 5 of the Children (Guernsey and Alderney) Law, 2008^g or section 4 of the Children (Sark) Law, 2016^h (as the case may be),

"permitted act" has the meaning given in section 8,

No. XXXVII of 2001, No. XXXIII of 2003, No. XX of 2015 and No. IX of 2016; and G.S.I. No. 27 of 2006. See also Ordinance No. XXXIII of 2009 and No. XX of 2015.

^f Order in Council No. XV of 2011.

^g Order in Council No. XIV of 2009; as amended by No. IV of 2018; Ordinance No. XI and No. XLVIII of 2009; No. XX of 2015; No. IX of 2016; and No. VI of 2017.

^h Order in Council No. VIII of 2016; as amended by Ordinance No. IX of 2016; and by Sark Ordinance No. I of 2017.

"prescribed" means prescribed by regulations made by the Committee,

"property" includes any thing in action and any interest in real or personal property,

"protective authorisation" has the meaning given in section 49,

"public authority" has the same meaning as in the Human Rights (Bailiwick of Guernsey) Law, 2000,

"the qualifying requirements" has the meaning given in section 50,

"Royal Court" means the Royal Court sitting as an Ordinary Court,

"relevant instrument" has the meaning given in s.22(2)(b),

"significant restriction" has the definition given in section 47,

"States" means the States of Deliberation,

"treatment" includes a diagnostic or other procedure,

"Tribunal" means the Mental Health and Capacity Review Tribunal,

"uniform scale" means the uniform scale set out in the Uniform Scale of Fines (Bailiwick of Guernsey) Law, 1989ⁱ, and

ⁱ Ordres en Conseil Vol. XXXI, p.278; amended by Order in Council No. XVIII of 2009 and No. IV of 2018; Ordinance No. XXII of 1998, No. XXIX of 2006 and No. XXIX of 2013.

"will" includes codicil.

(2) For the purposes of this Law, a person ("**D**") restrains another person ("**P**") if D –

- (a) uses, or threatens to use, physical, mechanical or chemical restraint, or any other type of force, on P to secure the doing of an act which P resists,
- (b) restricts, or threatens to restrict, P's freedom of movement (including, but not limited to, isolation, seclusion or segregation), whether or not P resists, or
- (c) authorises another person to do any thing set out in paragraph (a) or (b);

Provided that D does more than merely restrain P if D's act would be a significant restriction of P's personal rights.

(3) In subsection (2) –

"physical restraint" means the use of physical contact which is intended to prevent, restrict or subdue movement of any part of P's body,

"mechanical restraint" means the use of a device which is –

- (a) intended to prevent, restrict or subdue movement of any part of P's body, and
- (b) for the primary purpose of behavioural control, and

"chemical restraint" means the use of medication which is –

- (a) intended to prevent, restrict or subdue movement of any part of P's body, and
- (b) for the primary purpose of behavioural control.

(4) In this Law, references to making decisions, in relation to an attorney under a lasting power of attorney or a guardian appointed by the court, include, where appropriate, acting on decisions made.

(5) The States may by Ordinance amend the definitions in subsections (1) to (3).

NOTES

In section 1, first, the figures in square brackets in the definitions of the expressions "grantor" and "lasting power of attorney" in subsection (1) were substituted, second, the definitions of the expressions "dispose of" and "full fiduciary licence" and, third, paragraph (f) in the definition of the expression "bankrupt" in that subsection were all inserted by the Capacity (Lasting Powers of Attorney) (Bailiwick of Guernsey) Ordinance, 2022, section 21(1), respectively paragraph (a)(i), paragraph (a)(ii) and paragraph (a)(iii), with effect from 1st April, 2022.

The following Ordinance has been made under section 1:

Capacity (Lasting Powers of Attorney) (Bailiwick of Guernsey) Ordinance, 2022.

In accordance with the provisions of the Children (Consequential Amendments etc.) (Guernsey and Alderney) Ordinance, 2009, section 2, with effect from 4th January, 2010, and having regard to the references in this section to "guardian", a guardian or person referred to as such has parental responsibility in respect of a child if the conditions in subsection (1) or subsection (2) of that section are satisfied.

Excluded decisions.

2. (1) Nothing in this Law permits a decision on any of the following to be made on behalf of a person ("P") –

- (a) giving consent to –
 - (i) a marriage or civil partnership,
 - (ii) have sexual relations,
 - (iii) a decree of divorce being granted or an order dissolving a civil partnership being made,
 - (iv) P's child being placed for adoption by the Committee or any other adoption agency,
 - (v) the making of an adoption order in relation to P's child,
 - (vi) sterilisation or fertility treatment, and
 - (vii) participation in a high risk financial investment,
- (b) discharging P's parental responsibilities in matters not relating to a child's property, and
- (c) voting at an election for any public office or at any referendum.

(2) Nothing in this Law authorises any person –

- (a) to give P treatment for mental disorder, or

- (b) to consent to P being given treatment for mental disorder,

if, at the time when it is proposed to treat P, P's treatment is regulated by Part VIII of the Mental Health Law.

- (3) For the purposes of this section –

- (a) **"mental disorder"** and **"treatment"** have the same meaning as in the Mental Health Law,
- (b) **"high risk financial investment"** means a financial investment by a person which a reasonable observer would consider to be a high risk taking into account all relevant factors including –
 - (i) that person's financial circumstances,
 - (ii) the likelihood that the original investment could be substantially reduced,
 - (iii) that person's previous history of investment, and
 - (iv) any wishes on that investment previously expressed by that person whilst that person had capacity to make the investment, and
- (c) **"referendum"** means any referendum carried out under any enactment.

PART 2
PERSONS WHO LACK CAPACITY

Principles

Principles.

3. The following principles apply for the purposes of this Law –
- (a) a person ("P") must be assumed to have capacity unless it is established that P lacks capacity,
 - (b) P is not to be treated as unable to make a decision –
 - (i) unless all practicable steps to help P to do so have been taken without success, nor
 - (ii) merely because P makes an unwise decision,
 - (c) an act done, or decision made, under this Law for or on behalf of P must be done, or made, in P's best interests, and
 - (d) before the act is done, or the decision is made, regard must be had to whether the purpose for which it is needed can be as effectively achieved in a way that is less restrictive of P's rights and freedom of action.

Preliminary

Persons who lack capacity.

4. (1) For the purposes of this Law, a person ("P") lacks capacity in

relation to a matter if, at the material time –

- (a) P is unable to make a decision in relation to the matter,
and
- (b) P's inability is due to an impairment of, or a disturbance
in the functioning of, the mind or brain, whether the
impairment or disturbance is permanent or temporary.

(2) A lack of capacity cannot be established merely on the basis of
an unjustified assumption by reference to factors including (but not limited to) –

- (a) P's age, gender, sexuality, disability, race or
appearance, or
- (b) P's condition or an aspect of P's behaviour.

(3) In proceedings under this Law or any other enactment, any
question whether P lacks capacity within the meaning of this Law must be decided on
the balance of probabilities.

(4) Subject to section 16(3), no power which a person ("**D**") may
exercise under this Law –

- (a) in relation to P who lacks capacity, or
- (b) where D reasonably thinks that P lacks capacity,

is exercisable in relation to a person under 16.

Inability to make decisions.

5. (1) For the purposes of section 4(1), a person ("P") is unable to make a decision if P is unable –

- (a) to understand the information relevant to the decision,
- (b) to retain that information,
- (c) to use or weigh that information as part of the process of making the decision, or
- (d) to communicate P's decision (whether by talking, using sign language or any other means).

(2) For the purposes of –

- (a) subsection (1), the information relevant to a decision includes information about the reasonably foreseeable consequences of –
 - (i) deciding one way or another, or
 - (ii) failing to make the decision,
- (b) subsection (1)(a), P is not to be regarded as unable to understand the information relevant to a decision if P is only able to understand it, or an explanation of it, given to P in a way that is appropriate to P's needs and circumstances (including using simple language, visual aids or any other means), and
- (c) subsection (1)(b), the fact that P is able to retain the

information relevant to a decision for a short period only does not prevent P from being regarded as able to make the decision.

Best interests.

6. (1) In determining for the purposes of this Law what is in the best interests of a person ("**P**"), the person making the determination ("**D**") –

- (a) must, so far as reasonably practicable, permit and encourage P to participate, or to improve P's ability to participate, as fully as possible in any act done for P and any decision affecting P,
- (b) must not make it merely on the basis of an unjustified assumption about what might be in P's best interests, by reference to factors including (but not limited to) –
 - (i) P's age, gender, sexuality, disability, race or appearance, or
 - (ii) P's condition or an aspect of P's behaviour, and
- (c) must consider all the relevant information and circumstances and, in particular –
 - (i) D must consider –
 - (A) whether it is likely that P will at some time have capacity in relation to the matter in question, and

- (B) if it appears likely that P will have capacity, when that is likely to be,
- (ii) where the determination relates to life-sustaining treatment, D must not, in considering whether the treatment is in P's best interests, be motivated by a desire to bring about P's death,
- (iii) D must consider, so far as is reasonably ascertainable –
 - (A) P's past and present wishes and feelings (and, in particular, any relevant written statement made by P when P had capacity), and
 - (B) the beliefs and values that would be likely to influence P's decision if P had capacity, and
 - (C) any other factor that D reasonably believes that P would consider relevant, and
- (iv) D must take into account, if it is practicable and appropriate to consult them, the views of –
 - (A) anyone named by P as someone to be consulted on the matter in question or on matters of that kind,

- (B) anyone engaged in caring for P or interested in P's welfare,
- (C) any attorney under a lasting power of attorney granted by P, and
- (D) any guardian appointed for the person by a court,

as to what would be in P's best interests and, in particular, as to the matters mentioned in subparagraph (iii).

(2) The duties imposed by subsection (1) also apply in relation to the exercise of any powers which are exercisable –

- (a) under a lasting power of attorney, or
- (b) by a person under this Law who reasonably believes that another person lacks capacity.

(3) In the case of an act done, or a decision made, by a person other than a court having jurisdiction in relation to that act or decision, there is sufficient compliance with this section if (having complied with the requirements of subsection (1)) D reasonably believes that what D does or decides is in the best interests of P.

(4) For the purposes of subsection (1), "**relevant information and circumstances**" means the information and circumstances –

- (a) of which D is aware, and

(b) which it would be reasonable to regard as relevant.

(5) For the avoidance of doubt, nothing in this section prevents P from being placed out of the jurisdiction where it is necessary and proportionate to do so, having regard to P's needs and any relevant circumstances.

NOTE

In accordance with the provisions of the Children (Consequential Amendments etc.) (Guernsey and Alderney) Ordinance, 2009, section 2, with effect from 4th January, 2010, and having regard to the reference in this section to "guardian", a guardian or person referred to as such has parental responsibility in respect of a child if the conditions in subsection (1) or subsection (2) of that section are satisfied.

Limitation on significant restriction of P's personal rights.

7. (1) Subject to the provisions of this section, this Law does not authorise a person ("D") to significantly restrict the personal rights of another person ("P").

(2) D is authorised to significantly restrict P's personal rights if, by doing so, D is giving effect to a relevant decision of the Court.

(3) D is authorised to significantly restrict P's personal rights if the restriction is authorised under Part 8.

(4) D is authorised to significantly restrict P's personal rights while a decision as respects any relevant issue is sought from the Court if –

(a) there is a question about whether D is authorised to significantly restrict P's personal rights under subsection (2) or (3),

- (b) the significant restriction –
 - (i) is wholly or partly for the purpose of –
 - (A) giving P life-sustaining treatment, or
 - (B) doing any vital act, or
 - (ii) consists wholly or partly of –
 - (A) giving P life-sustaining treatment, or
 - (B) doing any vital act, and
 - (c) the significant restriction is necessary in order to –
 - (i) give the life-sustaining treatment, or
 - (ii) do the vital act.
- (5) For the purposes of this section –
- (a) **"a relevant decision of the Court"** is a decision made by an order under section 14(2) in relation to a matter concerning P's health and welfare, and
 - (b) a **"vital act"** is any act which the person doing it reasonably believes to be necessary to prevent a serious deterioration in P's condition.

Permitted acts in connection with care or treatment.

8. (1) Where a person ("**D**") does an act in connection with the care or treatment of another person ("**P**"), subsection (2) applies to that act (a "**permitted act**") if –

- (a) before doing the act, D takes reasonable steps to establish whether P lacks capacity in relation to the matter in question, and
- (b) when doing the act, D reasonably believes that –
 - (i) P lacks capacity in relation to the matter, and
 - (ii) it will be in P's best interests for the act to be done.

(2) Subject to subsection (3), D does not incur any liability in relation to the permitted act that D would not have incurred if P had –

- (a) had capacity to consent in relation to the matter, and
- (b) consented to D's doing the act.

(3) 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 permitted act, or
- (b) affects the operation of sections 35 to 38 (advance decisions to refuse treatment).

Permitted acts: limitations.

9. (1) If D does an act that is intended to restrain P, it is not a permitted act unless –

- (a) D reasonably believes that it is necessary to do the act in order to prevent harm to P, and
- (b) the act is a proportionate response to –
 - (i) the likelihood of P's suffering harm, and
 - (ii) the seriousness of that harm.

(2) Subject to subsection (3), an act is not a permitted act if it conflicts with a decision made by –

- (a) an attorney under a lasting power of attorney granted by P, or
- (b) a guardian appointed for P by a court in the Bailiwick,

within the scope of the authority of the attorney or guardian (as the case may be).

(3) Subsection (2) does not prevent a person –

- (a) providing life-sustaining treatment, or
- (b) doing any act which that person reasonably believes to be necessary to prevent a serious deterioration in P's condition,

while a decision as respects any relevant issue is sought from the Court.

NOTE

In accordance with the provisions of the Children (Consequential Amendments etc.) (Guernsey and Alderney) Ordinance, 2009, section 2, with effect from 4th January, 2010, and having regard to the references in this section to "guardian", a guardian or person referred to as such has parental responsibility in respect of a child if the conditions in subsection (1) or subsection (2) of that section are satisfied.

Payment for necessary goods and services.

10. (1) If necessary goods or services are supplied to a person ("**P**") who lacks capacity to contract for the supply, P must pay a reasonable price for them.

(2) For the purposes of this section –

"necessary" means suitable to P's condition in life and to P's actual requirements at the time when the goods or services are supplied, and

"services" includes accommodation.

Expenditure.

11. (1) If a permitted act involves expenditure, it is lawful for D –

(a) to pledge P's credit for the purpose of the expenditure,
and

(b) to apply money in P's possession for meeting the expenditure.

(2) If the expenditure is borne for P by D, it is lawful for D –

(a) to reimburse himself out of money in P's possession, or

(b) to be otherwise indemnified by P.

(3) Subsections (1) and (2) do not affect any power under which (apart from those subsections) a person –

(a) has lawful control of P's money or other property, and

(b) has power to spend money for P's benefit.

PART 3

POWERS OF AND APPLICATIONS TO COURT AND TRIBUNAL

Interpretation of Part 3.

12. For the purposes of this Part, "**Court**" means the Royal Court sitting as an Ordinary Court.

General powers of the Court

Power to make declarations.

13. (1) The Court may make declarations as to –

(a) whether a person ("**P**") has or lacks capacity to make a decision specified in the declaration,

(b) whether P has or lacks capacity to make decisions on such matters as are described in the declaration, and

(c) the lawfulness or otherwise of any act done, or yet to be

done, in relation to P.

(2) For the purposes of this section, an "**act**" includes an omission and a course of conduct.

Powers to make decisions: general.

14. (1) This section applies if a person ("**P**") lacks capacity in relation to a matter or matters concerning –

- (a) P's health and welfare, or
- (b) P's property and financial affairs.

(2) The Court may, by making an order, make any decision on P's behalf in relation to any matter falling within subsection (1).

(3) The powers of the Court under this section are subject to the provisions of this Law and, in particular, to sections 3 (the principles) and 6 (best interests).

(4) The Court may make such further orders or give such directions as it thinks necessary or expedient for giving effect to, or otherwise in connection with, an order made by it under subsection (2).

(5) Without prejudice to section 6, the Court may make an order or give any directions on such terms as it considers are in P's best interests, even though no application is before the Court for an order or directions on those terms.

(6) An order of the Court (including any directions) may be varied or discharged by a subsequent order.

- (7) Nothing in this Part limits the power of the Court –
 - (a) to order, authorise or secure the doing of any thing, or
 - (b) to make orders and give directions or authorities,

under the Third Schedule to the Mental Health Law.

(8) For the avoidance of doubt, the Court may, pending the determination of an application to it in relation to P, make an order or give directions in respect of any matter if –

- (a) there is a reason to believe that P lacks capacity in relation to that matter,
- (b) the matter is one to which its powers under this Law extend, and
- (c) it is in P's best interests to make the order, or give the directions, without delay.

Section 14 powers: health and welfare.

15. Without prejudice to the generality of section 14, the Court's powers under that section as respects P's health and welfare extend in particular to –

- (a) deciding where P is to live,
- (b) deciding what contact, if any, P is to have with any specified persons,
- (c) making an order prohibiting a named person from

having contact with P,

- (d) giving or refusing consent to the carrying out or continuation of a treatment by a person providing health care for P,
- (e) giving a direction that a person responsible for P's health care that would allow a different person to take over that responsibility, and
- (f) making any order in relation to a protective authorisation made in accordance with Part 8.

Section 14 powers: property and financial affairs.

16. (1) Without prejudice to the generality of section 14, the Court's powers under that section as respects P's property and financial affairs extend in particular to –

- (a) the control and management of P's property,
- (b) the sale, exchange, charging, gift or other disposition of P's property,
- (c) the acquisition of property in P's name or on P's behalf,
- (d) the carrying on, on P's behalf, of any profession, trade or business,
- (e) the taking of a decision which will have the effect of dissolving a partnership of which P is a member,

- (f) the carrying out of any contract entered into by P,
- (g) the discharge of P's debts,
- (h) the discharge of any of P's obligations, whether legally enforceable or not,
- (i) the settlement of any of P's property, whether for P's benefit or for the benefit of others,
- (j) the execution for P of a will,
- (k) the exercise of any power (including a power to consent) vested in P whether beneficially or as trustee or otherwise, and
- (l) the conduct of legal proceedings in P's name or on P's behalf.

(2) No will may be made under subsection (1)(j) at a time when P has not reached 18.

(3) The powers under section 14 as respects any other matter relating to P's property and financial affairs may be exercised even though P has not reached 16, if the Court considers it likely that P will still lack capacity to make decisions in respect of that matter when P reaches 16.

General powers of the Tribunal

Power to make declarations.

- 17.** (1) The Tribunal may make declarations as to –

- (a) whether a person ("**P**") has or lacks capacity to make a decision specified in the declaration,
- (b) whether P has or lacks capacity to make decisions on such matters as are described in the declaration, and
- (c) the lawfulness or otherwise of any act done, or yet to be done, in relation to P.

(2) For the purposes of this section, an "**act**" includes an omission and a course of conduct.

Powers to make decisions: general.

18. (1) This section applies if a person ("**P**") lacks capacity in relation to a matter concerning P's health and welfare.

(2) The Tribunal may, by making an order, make any decision on P's behalf in relation to any matter falling within subsection (1).

(3) The powers of the Tribunal under this section are subject to the provisions of this Law and, in particular, to sections 3 (the principles) and 6 (best interests).

(4) The Tribunal may make such further orders or give such directions as it thinks necessary or expedient for giving effect to, or otherwise in connection with, an order made by it under subsection (2).

(5) Without prejudice to section 6, the Tribunal may make any order or give any directions on such terms as it considers are in P's best interests, even though no application is before the tribunal for an order or directions on those terms.

(6) An order of the Tribunal (including any directions) may be varied or discharged by a subsequent order.

(7) The States may by Ordinance make provision to extend the power of the Tribunal to make decisions in relation to any matter concerning P's property and financial affairs.

(8) For the avoidance of doubt, the Tribunal may, pending the determination of an application to it in relation to P, make an order or give directions in respect of any matter if –

- (a) there is a reason to believe that P lacks capacity in relation to that matter,
- (b) the matter is one to which its powers under this Law extend, and
- (c) it is in P's best interests to make the order, or give the directions, without delay.

Section 18 powers: health and welfare.

19. (1) Without prejudice to the generality of section 18, the Tribunal's powers under that section as respects P's health and welfare extend in particular to –

- (a) deciding where P is to live,
- (b) deciding what contact, if any, P is to have with any specified persons,
- (c) making an order prohibiting a named person from

having contact with P,

- (d) giving or refusing consent to the carrying out or continuation of a treatment by a person providing health care for P, and
- (e) giving a direction that a person responsible for P's health care allow a different person to take over that responsibility, and
- (f) making any order in relation to a protective authorisation made in accordance with Part 8.

(2) When making a decision in a matter concerning P's health and welfare, the Tribunal may also make any ancillary decision but only if it is ancillary to a decision on P's health and welfare in relation to –

- (a) the control and management of P's property,
- (b) the carrying out of any contract entered into by P,
- (c) the discharge of P's debts,
- (d) the discharge of any of P's obligations, whether legally enforceable or not, and
- (e) any other matter which is ancillary to a decision taken in relation to P's health and welfare.

Power of Tribunal to refer matters to the Court.

20. (1) The Tribunal may refer any matter to the Court where the

Tribunal thinks it is in the interests of justice to do so in such manner and within such period as may be prescribed by rules of court.

(2) For the avoidance of doubt, on a reference to the Court sitting under this section, that Court has the powers set out in sections 13 to 16.

(3) For the purposes of this section –

- (a) the Tribunal may be constituted by a single member of the Tribunal sitting alone, and
- (b) for the avoidance of doubt, that member may sit outside the Bailiwick in order to exercise those powers.

Applications to the Court and Tribunal

Applications to the Court and Tribunal.

21. (1) No permission is required for an application to the Court or the Tribunal for the exercise of any of their powers under this Law –

- (a) by a person who lacks, or is alleged to lack, capacity,
- (b) if such a person has not reached 18, by anyone with parental responsibility for that person,
- (c) by the grantor or attorney under a lasting power of attorney to which the application relates,
- (d) by a guardian appointed by a court for a person to whom the application relates,

- (e) by a person named in an existing order of the Court or the Tribunal, if the application relates to the order,
- (f) by P's Representative under section 69, or
- (g) by an ICR under section 69,

but any application must be made in accordance with rules of court made under section 83.

(2) Subject to any rules of court, permission is required for any other application to the Court or the Tribunal.

(3) In deciding whether to grant permission, the Court or the Tribunal must, in particular, have regard to –

- (a) the applicant's connection with the person to whom the application relates,
- (b) the reasons for the application,
- (c) the benefit to the person to whom the application relates of a proposed order or directions, and
- (d) whether the benefit can be achieved in any other way.

NOTE

In accordance with the provisions of the Children (Consequential Amendments etc.) (Guernsey and Alderney) Ordinance, 2009, section 2, with effect from 4th January, 2010, and having regard to the reference in this section to "guardian", a guardian or person referred to as such has parental responsibility in respect of a child if the conditions in subsection (1) or

subsection (2) of that section are satisfied.

PART 4
LASTING POWERS OF ATTORNEY

General

Lasting powers of attorney.

22. (1) A lasting power of attorney is a power of attorney under which the grantor ("P") confers on the attorney ("A") authority to make decisions about all or any of the following –

- (a) P's health and welfare or specified matters concerning P's health and welfare, and
- (b) P's property and financial affairs or specified matters concerning P's property and financial affairs,

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

(2) For the avoidance of doubt, the authority conferred by a lasting power of attorney is subject to –

- (a) the provisions of this Law and, in particular, sections 3 (the principles) and 6 (best interests), and
- (b) any conditions or restrictions specified in the instrument conferring the authority (the "**relevant instrument**").

Creation etc. of lasting powers of attorney.

23. (1) The States may by Ordinance make such provision as they think fit in relation to lasting powers of attorney.

(2) Without limiting the power contained in subsection (1), the States may, in particular, provide for –

- (a) the creation, registration, activation, amendment, suspension, revocation and review of lasting powers of attorney,
- (b) the content of relevant instruments, and
- (c) the creation and punishment of offences for contravention of any provision of this Part or the Ordinance.

NOTE

The following Ordinance has been made under section 23:

Capacity (Lasting Powers of Attorney) (Bailiwick of Guernsey) Ordinance, 2022.

Appointment of attorneys.

24. (1) An A must be –

- (a) if the power relates to P's health and welfare, an individual who has reached 18, or
- (b) if the power relates to P's property and financial affairs, either such an individual or a person holding a full

fiduciary licence for the purposes of the Regulation of Fiduciaries, Administration Businesses and Company Directors, etc. (Bailiwick of Guernsey) Law, 2000^j.

[(2) An individual who is bankrupt may not be appointed as A under a lasting power of attorney in relation to P's property and financial affairs –

(a) where one or more of paragraphs (a) to (e) of the definition of "bankrupt" apply –

(i) the declaration, appointment or order was made, or

(ii) the composition, compromise or arrangement was entered into,

(as may be applicable having regard to the definition of "bankrupt") less than 10 years before the appointment as A is made, and

(b) where paragraph (f) of the definition of "bankrupt" applies, that individual has not been discharged from bankruptcy for the purposes of the law of the other jurisdiction outside the Bailiwick under which that individual was made bankrupt.]

(2) An individual who is bankrupt may not be appointed as A under a lasting power of attorney in relation to P's property and financial affairs

^j Order in Council No. I of 2001; there are amendments not relevant to this enactment.

where –

- (a) the declaration, appointment or order was made, or
- (b) the composition, compromise or arrangement was entered into,

(as may be applicable having regard to the definition of "**bankrupt**") not less than 10 years before the appointment as A is made.

(3) Subsections (4) to (7) apply in relation to an instrument under which two or more persons are to act as As of a lasting power of attorney.

(4) The instrument may appoint them to act –

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

(5) 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.

(6) If they are to act jointly, a failure, as respects one of them, to comply with the requirements of subsection (1) or (2) prevents a lasting power of attorney from being created.

(7) If they are to act jointly and severally, a failure, as respects one

A, to comply with the requirements of subsection (1) or (2) –

- (a) prevents the appointment taking effect in that A's case, but
 - (b) does not prevent a lasting power of attorney from being created in the case of the other A.
- (8) An instrument used to create a lasting power of attorney –
- (a) cannot give A power to appoint a substitute or successor, but
 - (b) may itself appoint a person to replace A on the occurrence of an event set out in an Ordinance made under section 23 which has the effect of terminating A's appointment.

NOTES

In section 24, subsection (2) was substituted by the Capacity (Lasting Powers of Attorney) (Bailiwick of Guernsey) Ordinance, 2022, section 21(1)(b), with effect from 1st April, 2022.

The Regulation of Fiduciaries, Administration Businesses and Company Directors, etc (Bailiwick of Guernsey) Law, 2000 has since been repealed by the Regulation of Fiduciaries, Administration Businesses and Company Directors, etc (Bailiwick of Guernsey) Law, 2020, section 62(a), with effect from 1st November, 2021, subject to the savings and transitional provisions in section 60 of the 2020 Law.

Restrictions.

25. (1) A lasting power of attorney does not authorise A or, if more than one, any A to do an act that is intended to restrain P, unless –

- (a) P lacks, or A reasonably believes that P lacks, capacity in relation to the matter in question,
- (b) A reasonably believes that it is necessary to do the act in order to prevent harm to P, and
- (c) the act is a proportionate response to –
 - (i) the likelihood of P's suffering harm, and
 - (ii) the seriousness of that harm.

(2) Where a lasting power of attorney authorises A to make decisions about P's health and welfare, the authority –

- (a) does not extend to making such decisions in circumstances other than those where P lacks, or A reasonably believes that P lacks, capacity,
- (b) does not permit A to consent to the grant of a protective authorisation under Part 8,
- (c) is subject to sections 35 to 38 (advance decisions), and
- (d) subject to subsection (3), extends to giving or refusing consent to the carrying out or continuation of a treatment by a person providing health care for P.

(3) Subsection (2)(d) –

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

Gifts.

26. (1) Where a lasting power of attorney confers authority to make decisions about P's property and financial affairs, it does not authorise A (or, if more than one, any A) to dispose of P's property by making gifts except to the extent permitted by subsection (2).

(2) Subject to any conditions or restrictions in the instrument, A may make gifts –

- (a) on customary occasions to persons (including A) who are related to or connected with P, or
- (b) to any charity to whom P 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 P's estate.

(3) For the purposes of subsection (2)(a), "**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.

Limitation on power to dispose of real property.

27. (1) Where –

- (a) A proposes to dispose of P's real property (whether for value or otherwise), and
- (b) P does not have capacity to consent to that disposal,

A may only dispose of that real property in accordance with the provisions of an Ordinance made under section 23.

(2) Where A disposes of P's real property other than in accordance with the provisions of an Ordinance made under section 23, A is guilty of an offence and is liable –

- (a) on summary conviction, to imprisonment for a term not exceeding 2 years or a fine not exceeding level 5 on the uniform scale, or both,
- (b) on conviction on indictment, to imprisonment for a term not exceeding 10 years or a fine, or both.

Register of Lasting Powers of Attorney.

28. (1) Her Majesty's Greffier shall establish and maintain a register to be called the Register of Lasting Powers of Attorney ("**the Register**").

(2) The Register –

- (a) need not be kept in documentary form, and
- (b) shall include the following details in relation to each lasting power of attorney –
 - (i) whether the lasting power of attorney relates to health and welfare, property and financial affairs, or both (as the case may be),
 - (ii) the name and address of each A, and
 - (iii) any other prescribed information.

(3) Subject to such circumstances as may be prescribed, in which Her Majesty's Greffier may impose a prohibition or restriction on the publication or communication of information appearing on, or relating to, any entry on the Register, Her Majesty's Greffier shall, on payment of the prescribed fee, supply copies and extracts (certified or uncertified) of any entry in it.

Protection of attorneys and others if no power created or power terminated.

29. (1) Subsections (2) and (3) apply if a lasting power of attorney –

- (a) was purported to be created, but
- (b) for any reason, was not created,

regardless of the time of the act or transaction in question.

(2) An A who acts in purported exercise of the power does not incur any liability (to P or any other person) because of the non-existence of the

power unless at the time of acting A –

- (a) knows that a lasting power of attorney was not created,
or
- (b) is aware of circumstances which, if a lasting power of attorney had been created, would have terminated A's authority to act as an attorney.

(3) Any transaction between A 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 A 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 lasting power of attorney was [activated], or
- (b) the other person makes a sworn declaration, before or within 3 months after the completion of the purchase, that the other person had no reason at the time of the transaction to doubt that A had authority to dispose of the property which was the subject of the transaction.

(5) A "**sworn declaration**" for the purposes of subsection (4)(b) means a declaration made under oath or by affirmation before a notary public or other person entitled to administer oaths.

NOTE

In section 29, the word in square brackets in subsection (4)(a) was substituted by the Capacity (Lasting Powers of Attorney) (Bailiwick of Guernsey) Ordinance, 2022, section 21(1)(c), with effect from 1st April, 2022.

Powers of Court in relation to lasting powers of attorney

Powers of Court relating to validity.

- 30.** (1) This section and section 31 apply if –
- (a) a person ("P") has executed or purported to execute an instrument with a view to creating a lasting power of attorney, or
 - (b) a lasting power of attorney has been created by P.
- (2) The Court may determine any question relating to –
- (a) whether one or more of the requirements for the creation of a lasting power of attorney have been met, or
 - (b) whether the power has been revoked or otherwise come to an end.
- (3) Subsection (4) applies if the Court is satisfied –
- (a) that fraud or undue pressure was used to induce P –
 - (i) to execute an instrument for the purpose of

creating a lasting power of attorney, or

(ii) to create a lasting power of attorney, or

(b) that an A under a lasting power of attorney –

(i) has behaved, or is behaving, in a way that contravenes A's authority or is not in P's best interests, or

(ii) proposes to behave in a way that would contravene A's authority or would not be in P's best interests.

(4) The Court may –

(a) direct that any act required to create the lasting power of attorney is not to be done, or

(b) if P lacks capacity to do so, revoke the lasting power of attorney.

(5) If there is more than one A, the Court may under subsection (4)(b) revoke the instrument or the lasting power of attorney so far as it relates to any A.

Powers of Court relating to operation.

31. (1) The Court may determine any question as to the meaning or effect of a lasting power of attorney or an instrument purporting to create one.

(2) The Court may –

- (a) give directions with respect to decisions –
 - (i) which A has authority to make, and
 - (ii) which P lacks capacity to make,
 - (b) give any consent or authorisation to act which A would have to obtain from P if P had capacity to give it.
- (3) The Court may, if P lacks capacity to do so –
- (a) give directions to A with respect to the rendering by A of reports or accounts and the production of records kept by A for that purpose,
 - (b) require A to supply information or produce documents or things in A's possession as attorney,
 - (c) give directions with respect to A's remuneration or expenses,
 - (d) relieve A wholly or partly from any liability which A has or may have incurred on account of a breach of A's duties as attorney.
- (4) The Court may authorise the making of gifts which are not within section 26(2) (permitted gifts).

Interpretation of Part 4.

32. (1) For the purposes of this Part –

- (a) "A" means an attorney appointed under a lasting power of attorney, and
- (b) except for section 30 and 31, "P" means the grantor of the power of attorney.

(2) Where two or more As are appointed under a lasting power of attorney, references to an attorney or "A" are to all As or any A, unless the contrary intention appears.

(3) For the purposes of this Part, "the Committee" includes any person appointed or otherwise directed by the Chief Pleas of Sark, or one of its committees, to deal with safeguarding matters.

Disclosure of information or documents.

33. (1) Without prejudice to any other power of disclosure –

- (a) Her Majesty's Greffier may disclose to the Committee, and
- (b) the Committee may disclose to Her Majesty's Greffier,

any information or documents provided for the purposes of this Part where the Greffier or the Committee (as the case may be) believes that such disclosure is necessary in order to safeguard P or P's interests.

(2) Except as provided by subsection (3), the supply of information under this section is to be taken not to breach any restriction on the

disclosure of information (however arising or imposed).

(3) This section does not authorise the doing of anything that contravenes the Data Protection (Bailiwick of Guernsey) Law, 2017^k.

Liability of Her Majesty's Greffier.

34. No liability shall be incurred by Her Majesty's Greffier, or any person responsible to Her Majesty's Greffier, in respect of anything done or omitted to be in the discharge or purported discharge of any of their functions under this Part or under any Ordinance made under section [23], unless the thing was done or omitted to be done in bad faith.

NOTE

In section 34, the figures in square brackets were substituted by the Capacity (Lasting Powers of Attorney) (Bailiwick of Guernsey) Ordinance, 2022, section 21(1)(d), with effect from 1st April, 2022.

PART 5

ADVANCE DECISIONS TO REFUSE TREATMENT

Advance decisions.

35. (1) An advance decision to refuse treatment (an "**advance decision**") is a decision made by a person ("**P**") that if –

- (a) at a later time and in such circumstances as P may specify, a specified treatment is proposed to be carried out or continued by a person providing health care for P, and

^k No. VI of 2018; as amended by No. IV of 2018; Ordinance Nos. X and XI of 2008 and No. I of 2019; and G.S.I. No. 21 of 2019.

- (b) at that time P lacks capacity to consent to the carrying out or continuation of the treatment,

the specified treatment is not to be carried out or continued.

(2) For the purposes of subsection (1)(a), a decision may be regarded as specifying a treatment or circumstances even though expressed in layman's terms.

Making etc. advance decisions.

36. (1) P may make an advance decision if, at the time of making the decision, P –

- (a) has reached 16 years of age,
- (b) has the capacity to make that decision, and
- (c) is not placed under undue pressure to make that decision.

(2) An advance decision must be made in –

- (a) the prescribed form, or
- (b) a written document including the same information as set out in the prescribed form,

and must be signed by P.

(3) P may amend or revoke an advance decision at any time when

P has capacity to do so by using –

- (a) the prescribed form, or
- (b) a written document including the same information as set out in the prescribed form,

which is signed by P.

(4) For the avoidance of doubt –

- (a) any reference in this section to a form or document being "**signed by P**" includes a reference to another person signing that form or document in P's presence and at P's direction,
- (b) an advance decision must be witnessed by another person only if it relates (in full or in part) to life-sustaining treatment,
- (c) where an advance decision must be witnessed –
 - (i) P must –
 - (A) sign, or
 - (B) where another person signs the form or document in P's presence and at P's direction, acknowledge that signature on,

that form or document in the presence of the witness, and

- (ii) the witness must sign that form or document, or acknowledge that signature, in P's presence.

Effect of advance decisions.

37. (1) If P has made an advance decision which is –

- (a) valid (in accordance with section 38(1)), and
- (b) applicable to a treatment (in accordance with section 38(3) or (4) as appropriate),

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

(2) A person will only incur liability for carrying out or continuing the treatment if, at the time, that person –

- (a) is satisfied that an advance decision exists which is valid and applicable to the treatment, and
- (b) carries out or continues that treatment nonetheless.

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

(4) The relevant court may make a declaration as to whether an

advance decision –

- (a) exists,
 - (b) is valid, and
 - (c) is applicable to a treatment.
- (5) Nothing in an apparent advance decision stops a person –
- (a) providing life-sustaining treatment, or
 - (b) doing any act that the person reasonably believes to be necessary to prevent a serious deterioration in P's condition,

while a declaration as respects any relevant issue is sought from the relevant court.

(5) Unless the context requires otherwise, for the purposes of this section, "**relevant court**" means –

- (a) in respect of Alderney, the Court of Alderney,
- (b) in respect of Sark, the Court of the Seneschal, and
- (c) in any other case, the Royal Court sitting as an Ordinary Court.

Validity and applicability of advance decisions.

38. (1) An advance decision is not valid if P –

- (a) has revoked the decision at a time when P had capacity to do so,
- (b) has, under a lasting power of attorney created after the advance decision was made, conferred authority on the attorney (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 P's fixed decision while P had capacity.

(2) The existence of any lasting power of attorney other than one of a description mentioned in subsection (1)(b) does not prevent the advance decision from being regarded as valid and applicable.

(3) An advance decision is not applicable to the treatment in question if –

- (a) at the material time P has capacity to give or refuse consent to it,
- (b) that treatment is not the treatment specified in the advance decision,
- (c) any circumstances specified in the advance decision are absent, or
- (d) 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 P anticipated them.

(4) An advance decision is not applicable to life-sustaining treatment unless –

- (a) the decision is verified by a statement by P to the effect that it is to apply to that treatment even if P's life is at risk, and
- (b) a prescribed person has signed the advance decision to confirm that P has been given appropriate advice (including but not limited to) advice in relation to –
 - (i) the specified treatment,
 - (ii) the consequences of P's decision, and
 - (iii) other possible treatment options available for the medical condition which is proposed to be treated by the specified treatment.

PART 6

ADVANCED CARE PLANS

Advanced care plans.

39. (1) An advanced care plan is an expression of the wishes and preferences of a person ("P") in relation to –

- (a) P's future care, health and welfare, including but not limited to –

- (i) where P would like care to be provided,
 - (ii) how P would like care to be provided,
 - (iii) whether P objects to care being provided in a way which might require a protective authorisation under Part 8,
 - (iv) who should be consulted in relation to any decisions about P's care,
 - (v) any religious, spiritual or ethical views which P would wish to be respected when care is provided, and
 - (vi) any other wishes and preferences in relation to P's care, health and welfare, and
- (b) any wishes and preferences relating to end of life care and associated arrangements (including but not limited to funeral arrangements and transplantation of human tissue),

and for the purposes of this subsection, "**care**" is to be given its widest possible meaning.

(2) An advanced care plan –

- (a) shall be taken into account by a decision maker, or other person carrying out an assessment, when

considering P's best interests, but

- (b) for the avoidance of doubt, is not binding on any decision maker or person carrying out an assessment.

Making etc. advanced care plans.

40. (1) P may make an advanced care plan if, at the time of making the decision, P –

- (a) has reached 16 years of age,
- (b) has the capacity to make decisions of the type contained in the advanced care plan, and
- (c) is not placed under undue pressure by another person to make that decision.

(2) An advanced care plan must be made in –

- (a) the prescribed form, or
- (b) a written document including the same information as set out in the prescribed form,

and must be signed by P.

(3) P may amend or revoke an advanced care plan at any time when P has capacity to do so by using –

- (a) the prescribed form, or

- (b) a written document including the same information as set out in the prescribed form,

which is signed by P.

- (4) For the avoidance of doubt –
 - (a) any reference in this section to a form or document being "**signed by P**" includes a reference to another person signing that form or document in P's presence and at P's direction, and
 - (b) an advanced care plan need not be witnessed by another person.

PART 7

INDEPENDENT CAPACITY REPRESENTATIVES

Arrangements and appointment.

41. (1) The Committee must make such arrangements as it considers reasonable to enable independent capacity representatives to be available to represent and support –

- (a) persons to whom acts or decisions proposed under sections 43 and 44 relate,
- (b) persons who may be affected by a safeguarding inquiry or issue for the purposes of section 45, and
- (c) persons who fall within section 46.

(2) In making arrangements under subsection (1), the Committee must have regard to the principle that a person to whom a proposed act or decision relates should, so far as practicable, be represented and supported by a person who is independent of any person who will be responsible for the act or decision.

(3) The arrangements may include provision for payments to be made to, or in relation to, persons carrying out functions in accordance with the arrangements.

(4) A person may only be appointed as an independent capacity representative (an "**ICR**") if that person is approved by resolution of the Committee.

(5) For the avoidance of doubt, the Committee may, by further resolution, revoke or suspend any approval made under subsection (4).

(6) The Committee may, by regulations, make such other provision as to the appointment of ICRs as it thinks fit.

Functions.

- 42.** (1) The functions of an ICR are to –
- (a) provide support to the person ("**P**") for whom the ICR has been appointed so that P may participate as fully as possible in any relevant decision,
 - (b) obtain and evaluate relevant information,
 - (c) ascertain what P's wishes and feelings would be likely to be, and the beliefs and values that would be likely to influence P, if P had capacity,

- (d) ascertain what alternative courses of action are available in relation to P,
- (e) obtain a further medical opinion where treatment is proposed and the ICR thinks that one should be obtained, and
- (f) do, or arrange to have done, any other reasonably practicable thing to support P.

(2) The ICR may take all steps necessary to carry out the functions set out in subsection (1), and in particular –

- (a) may interview P in private, and
- (b) may, at all reasonable times, examine and take copies of –
 - (i) any health record of P, and
 - (ii) any record of, or held by, an Island authority and compiled in connection with a social services function,

which the person holding the record considers may be relevant to the ICR's investigation.

(3) For the avoidance of doubt, an ICR has the same rights to challenge any decision as if the ICR were any other person engaged in caring for P or interested in P's welfare.

- (4) The Committee may by regulation –
 - (a) amend subsection (1), and
 - (b) make such other provision as to the functions of ICRs as it thinks fit.

Serious medical treatment.

- 43. (1) Subject to subsection (5), if an Island authority –
 - (a) is proposing to provide, or secure the provision of, serious medical treatment for a person ("P") who lacks capacity to consent to the treatment, and
 - (b) is satisfied that there is no person, other than one engaged in providing care or treatment for P in a professional capacity or for remuneration, whom it would be appropriate to consult in determining what would be in P's best interests,

the Island authority must, before the treatment is provided, instruct an ICR to represent P.

(2) If the treatment needs to be provided as a matter of urgency, it may be provided even though the Island authority has not complied with subsection (1).

(3) The Island authority must, in providing or securing the provision of treatment for P, take into account any information given, or submissions made, by the ICR.

(4) For the purposes of subsection (1), "**serious medical treatment**" is treatment which involves providing, withholding or withdrawing treatment in circumstances where –

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

(5) The Committee may by regulations amend the definition set out in subsection (4).

(6) This section does not apply if P's treatment would be provided under the Mental Health Law.

Provision of accommodation.

44. (1) Subject to subsection (4), an Island authority may request the appointment of an ICR if it –

- (a) proposes to make arrangements –
 - (i) for the provision of accommodation (whether in a hospital, care home or any other placement) for a person ("**P**") who lacks capacity to agree to the arrangements, or

- (ii) for a change in P's accommodation to another hospital, care home or placement,

which is likely to be provided for a continuous period of at least 28 days, and

- (b) is satisfied that there is no person, other than one engaged in providing care or treatment for P in a professional capacity or for remuneration, whom it would be appropriate for it to consult in determining what would be in P's best interests.

(2) If the Island authority has made arrangements described in subsection (1)(a), but –

- (a) did not instruct an ICR to represent P before making the arrangements because it was satisfied that the provision was not likely to be for a continuous period longer than 28 days, and
- (b) subsequently has reason to believe that the accommodation is likely to be provided for a continuous period of at least 28 days,

it must re-consider whether to request the appointment of an ICR.

(3) The Island authority must, in deciding what arrangements or further arrangements to make for P, take into account any information given, or submissions made, by the ICR.

(4) Subsection (1) does not apply if –

- (a) P is accommodated as a result of an obligation imposed or an order made under the Mental Health Law, or
- (b) P –
 - (i) has capacity to decide whether or not P wishes an ICR to perform the functions set out in section 42, and
 - (ii) does not wish an ICR to perform those functions.

Safeguarding and other cases.

45. (1) An Island authority may request the appointment of an ICR –

- (a) where –
 - (i) a safeguarding investigation of any description is being carried out, or
 - (ii) an allegation has been made,which might affect the appropriateness of any person to make decisions or be consulted on behalf of P, or
- (b) where the Committee otherwise considers that it is appropriate in order to safeguard P.

(2) For the purposes of this section, "**safeguarding investigation**" means any investigation undertaken in accordance with an Ordinance made under

section 73.

(3) For the avoidance of doubt, an Island authority may request the appointment of an ICR in relation to any other case where there is not a requirement to do so in this Part.

Person subject to protective authorisation scheme.

46. (1) Subject to subsection (8), an Island authority must request the appointment of an ICR where –

- (a) a person ("P") –
 - (i) is, or is proposed to be, accommodated in a hospital, care home or other placement by or on behalf of the Island authority,
 - (ii) receives, or may receive, services provided by or on behalf of the Island authority,
- (b) P will, or it is likely that P will, become subject to a protective authorisation as a result of that accommodation or provision of services, and
- (c) the Island authority is satisfied that there is no person, other than one engaged in providing care or treatment for P in a professional capacity or for remuneration, whom it would be appropriate to consult in determining what would be in P's best interests.

(2) The Island authority must request the appointment of an ICR where a person ("P") is subject to the protective authorisation scheme and –

- (a) a Capacity Professional requests the appointment of an ICR, or
- (b) the Capacity Professional is satisfied that there is no person, other than one engaged in providing care or treatment for P in a professional capacity or for remuneration, whom it would be appropriate to consult in determining what would be in P's best interests.

(3) A Capacity Professional may request the appointment of an ICR where the Capacity Professional thinks that it is appropriate, in particular where

—

- (a) P or P's Representative requests the appointment of an ICR,
- (b) P's Representative could not otherwise carry out the functions set out in section 71(3), or
- (c) a safeguarding investigation is being carried out or an allegation has been made which might affect the appropriateness of P's Representative or any other person to make decisions or be consulted on behalf of P in relation to the protective authorisation.

(4) Where an ICR is appointed under this section, the ICR, in addition to the functions set out in section 42(1) —

- (a) must take such steps as are reasonably practicable to help —

- (i) P and P's Representative, as the case may be, to understand the following matters –
 - (A) the effect, purpose and duration of any, or any proposed, authorisation,
 - (B) any conditions to which the authorisation is, or is proposed to be, subject,
 - (C) the right to request a re-assessment of the qualifying requirements for the protective authorisation by a Capacity Professional,
 - (D) the right to make an application to a court or the Tribunal challenging the protective authorisation,
 - (E) any other right to make a complaint concerning the protective authorisation, and
 - (F) how to exercise the rights set out in items (C) to (E), and
- (ii) P and P's Representative, as the case may be, to exercise the right to –
 - (A) request a re-assessment of any of the

qualifying requirements, or

(B) challenge the protective authorisation,
and

(b) where it is in P's interests to do so, may exercise the
right to –

(i) request a re-assessment of any of the qualifying
requirements,

(ii) challenge the protective authorisation, or

(iii) make a complaint concerning the protective
authorisation.

(5) For the avoidance of doubt, if the ICR helps P or P's
Representative to –

(a) request a re-assessment of any of the qualifying
requirement for the protective authorisation, the ICR
may –

(i) make submissions to the Capacity Professional
on the question of whether a qualifying
requirement should be re-assessed, and

(ii) give information, or make submissions, to any
person carrying out a re-assessment, and

(b) challenge the protective authorisation, the ICR may –

(i) assist P, P's Representative and any other person acting on P's behalf to make submissions, and

(ii) make submissions,

in support of that application.

(6) For the purposes of this section, "**safeguarding investigation**" means any investigation undertaken under Part 9.

(7) Nothing in this section shall prevent an ICR from subsequently being appointed as P's Representative under section 71 in relation to the same person.

(8) Subsection (1) does not apply where P –

(a) has capacity to decide whether or not P wishes an ICR to perform the functions set out in section 42, and

(b) does not wish an ICR to perform those functions.

PART 8

PROTECTIVE AUTHORISATION SCHEME

Significant restriction of a person's personal rights.

47. (1) For the purposes of this Part, a significant restriction of P's personal rights (a "**significant restriction**") occurs when –

(a) a person ("**P**") is confined in a particular restricted space for a not negligible time,

- (b) P has not validly consented to that confinement, and
- (c) the arrangements which include the confinement ("**the relevant arrangements**") are made by, or are due to an action of, a person or body responsible to, or regulated by, an Island authority,

and, for the avoidance of doubt, includes a deprivation of liberty within the meaning of article 5(1) of the Human Rights Convention.

(2) For the purposes of subsection (1), "**confined**" and "**confinement**" means where P –

- (a) is prevented from moving from the place in which P is required to reside, in order to live where and with whom P chooses, and
- (b) is subject to continuous supervision and control.

(3) For the avoidance of doubt –

- (a) a significant restriction does not occur –
 - (i) where P is detained in an approved establishment in accordance with the Mental Health Law, or
 - (ii) where P is admitted to a hospital or other establishment for the provision of prescribed medical treatment,

- (b) a significant restriction does not occur where P has not reached 16, and
- (c) relevant arrangements for the purposes of subsection (1) can include where –
 - (i) P resides in a private dwelling, and
 - (ii) care or treatment is provided by, or is due to an action of, a person or body responsible to, or regulated by, an Island authority.

Capacity professionals.

48. (1) The Committee, after consultation with the Medical & Emergency Services Committee of the Chief Pleas of Sark, may by resolution approve Capacity Professionals for the purposes of carrying out –

- (a) the functions set out in this Part and any relevant code of practice, and
- (b) such other functions as are conferred upon Capacity Professionals under this Law or any other enactment,

upon such terms and subject to such conditions as it thinks fit.

(2) For the avoidance of doubt, the Committee may, after consultation with the Medical & Emergency Services Committee of the Chief Pleas of Sark, by further resolution, revoke or suspend any approval or vary the terms and conditions of any approval made under subsection (1).

(3) A Capacity Professional shall carry out the functions set out in

subsection (1) with fairness, impartiality and independence and in a manner that is in the best interests of any person who is the subject of any such function.

(4) The States may by Ordinance make such provision as they see fit in relation to –

- (a) rights of entry for Capacity Professionals to any placement where a person is subject to a protective authorisation,
- (b) rights for Capacity Professionals to require information or the production of documents from any person in relation to protective authorisation,
- (c) the creation and punishment of offences for contravention of any such rights.

Protective authorisation.

49. (1) A protective authorisation in relation to a person ("P") authorises –

- (a) relevant arrangements which are a significant restriction, and
- (b) any act done which is required by or ancillary to those arrangements, including the conveyance of P to and from a placement as may be required from time to time for the purposes of the relevant arrangements.

(2) For the avoidance of doubt, a protective authorisation does not authorise an arrangement or act which would only be a restriction with P's rights

under article 8 of the Human Rights Convention.

(3) Where the placement is not a hospital operated by the Committee or a private dwelling, a protective authorisation may only be granted in relation to a placement which has been approved by or on behalf of the Committee.

(4) For the purposes of subsection (3), a placement may only be approved by the Committee where it is satisfied that, having taken into account the qualifications and quality of the management, personnel and facilities of the placement, the relevant duties and functions set out in this Law, and particularly this Part, will be carried out or performed (as the case may be).

(5) A protective authorisation must be granted in the prescribed form.

Requirements and assessments

Qualifying requirements.

50. The requirements ("**the qualifying requirements**") for the purposes of a protective authorisation in relation to a person ("**P**") are –

- (a) the age requirement,
- (b) the capacity (functional) requirement,
- (c) the significant restriction requirement,
- (d) the cognitive impairment (diagnostic) requirement,
- (e) the contrary decisions requirement, and

- (f) the best interests requirement.

The age requirement.

51. The age requirement is satisfied if P is assessed to have reached 16.

The capacity (functional) requirement.

52. The capacity (functional) requirement is satisfied if P is assessed to lack capacity in relation to the question whether or not P should be accommodated in the placement under the arrangements for the purpose of being given the relevant care or treatment.

The significant restriction requirement.

53. The significant restriction requirement is satisfied if the arrangements made, or proposed to be made, in relation to P by the person or body amount to a significant restriction for the purposes of section 47.

The cognitive impairment (diagnostic) requirement.

54. (1) The cognitive impairment (diagnostic) requirement is satisfied if P is assessed to have a cognitive impairment.

- (2) For the purposes of subsection (1), "**cognitive impairment**" –

- (a) means an impairment or disturbance in the mind or brain, whether temporary or permanent, which has an adverse effect on that person's ability to carry out normal day-to-day activities, and
- (b) for the avoidance of doubt, includes a mental disorder within the meaning of section 1 of the Mental Health Law, but disregarding section 1(3) of that Law in relation to persons with learning disability.

The contrary decisions requirement.

55. The contrary decisions requirement is satisfied if –

- (a) P is assessed not to have previously expressed an objection to the arrangement, including by way of a valid advance decision to refuse treatment under Part 5, or
- (b) P's guardian or attorney (if any) is assessed not to have expressed an objection to the arrangement, if within the scope of that guardian's or attorney's authority.

NOTE

In accordance with the provisions of the Children (Consequential Amendments etc.) (Guernsey and Alderney) Ordinance, 2009, section 2, with effect from 4th January, 2010, and having regard to the references in this section to "guardian", a guardian or person referred to as such has parental responsibility in respect of a child if the conditions in subsection (1) or subsection (2) of that section are satisfied.

The best interests requirement.

56. The best interests requirement is satisfied if –

- (a) the grant of a protective authorisation –
 - (i) will allow the provision of necessary care and treatment to P in a proportionate manner and in the less restrictive manner, and
 - (ii) is otherwise appropriate, including having regard to the likelihood of P suffering harm and

the seriousness of any such harm, and

- (b) the arrangements will be the least restrictive practicably available option to best promote P's best interests and welfare.

Assessments.

57. (1) Subject to subsection (2), a prescribed assessment must be completed by a prescribed person or a Capacity Professional.

(2) For an assessment required under –

- (a) section 50(a) (age), and
- (b) section 50(b) (capacity), (c) (significant restriction), (d) (cognitive impairment) and (e) contrary decisions,

a prescribed person may rely upon an equivalent assessment.

(3) An "**equivalent assessment**" means, for the purposes of –

- (a) subsection (2)(a), an assessment which the Capacity Professional is satisfied is reliable, and
- (b) subsection (2)(b), an assessment which has been –
 - (i) completed in the previous 12 months, and
 - (ii) which has been reviewed by a Capacity Professional who is satisfied that it does not require an update.

(4) Where a Capacity Professional is satisfied that an equivalent assessment requires an update, the Capacity Professional must complete, or arrange for the completion of, a new assessment.

Processes

Protective authorisation process A.

58. (1) This process applies where the relevant arrangements are provided, or are to be provided, by or on behalf of the Committee, except where P is admitted to hospital.

(2) Where a prescribed person believes that –

- (a) those arrangements in relation to P amount to, or will amount to, a significant restriction, and
- (b) P lacks capacity to consent to those arrangements,

that person must apply to a Capacity Professional to oversee the completion of the assessments of the requirements set out in section 50.

(3) Where P, P's Representative or an ICR object to the arrangements, a Capacity Professional –

- (a) must complete the assessments required by section 50(b) (capacity), (c) (significant restriction) and (f) (best interests), and
- (b) may complete, or arrange for the completion of, the other assessments required.

(4) Under this process, a protective authorisation may be granted by a Capacity Professional for a period not exceeding 12 months.

Protective authorisation process B.

59. (1) This process applies where the relevant arrangements are not provided, or are not to be provided, by or on behalf of the Committee and, for the avoidance of doubt, includes where they are, or are to be provided, by or on behalf of the Chief Pleas of Sark.

(2) Where a prescribed person believes that –

- (a) those arrangements in relation to P amount to, or will amount to, a significant restriction, and
- (b) P cannot consent to those arrangements,

that person must –

- (i) grant a protective authorisation for a period not exceeding 28 days, and
- (ii) apply to a Capacity Professional to oversee the completion of the other assessments required by section 50.

(3) A Capacity Professional –

- (a) must complete the assessments required by section 50(c) (significant restriction) and (f) (best interests), and

- (b) may complete, or arrange for the completion of, the other assessments required.

(4) Under this process, a protective authorisation may be granted by a Capacity Professional for a period not exceeding 12 months.

Protective authorisation process C.

60. (1) This process applies where the relevant arrangements relate to P's admission to a hospital operated by the Committee.

(2) Where a prescribed person believes that –

- (a) P is likely to remain admitted to hospital for a period of up to 28 days only,
- (b) those arrangements in relation to P amount to, or will amount to, a significant restriction, and
- (c) P cannot consent to those arrangements,

that person must grant a protective authorisation for a period not exceeding 28 days.

(3) In any other case, where a prescribed person believes that –

- (a) the arrangements in relation to P amount to, or will amount to, a significant restriction,
- (b) P cannot consent to those arrangements,

that person must –

- (i) grant a protective authorisation for a period not exceeding 28 days, and
- (ii) apply to a Capacity Professional to oversee the completion of the other assessments required by section 50.

(4) Where a prescribed person has granted a protective authorisation under subsection (2) but believes that P is likely to remain admitted to hospital after the expiry of the original 28 day period, that person must apply to a Capacity Professional to oversee the completion of the other assessments required by section 50.

(5) A Capacity Professional –

- (a) must complete the assessments required by section 50(b) (capacity), (c) (significant restriction) and (f) (best interests), and
- (b) may complete, or arrange for the completion of, the other assessments required.

(6) Under this process, a protective authorisation may be granted by a Capacity Professional for a period not exceeding 12 months.

Power of Capacity Professional to extend protective authorisation granted by prescribed person under process C.

61. A Capacity Professional may extend a protective authorisation granted by a prescribed person under section 60(2) for a period of up to 7 days where that Professional believes it is necessary to do so in the best interests of P.

Portability of protective authorisation.

62. Where a person ("P") is –

- (a) subject to a protective authorisation, and
- (b) moved to a new placement,

that protective authorisation continues to have effect, and a further protective authorisation is not required, if a Capacity Professional believes that the relevant arrangements in the new placement would not require a material condition to be varied by imposing a further restriction on P.

Suspension of protective authorisation.

63. A protective authorisation –

- (a) may be suspended by a Capacity Professional for a period not exceeding 1 month, but
- (b) may only be re-activated subsequently where a Capacity Professional believes that the relevant arrangements would not require a material condition to be varied by imposing a further restriction on P.

Variation of protective authorisation.

64. A Capacity Professional may vary a protective authorisation if that Professional is satisfied that –

- (a) consultation under section 67 has been carried out,
- (b) a re-assessment of the relevant qualifying requirements has taken place,

- (c) the variation is due to a change of P's placement.

Cessation of protective authorisation.

65. (1) A protective authorisation ceases to have effect where –

- (a) the period for which the protective authorisation was granted has expired, without it being renewed or extended,
- (b) a Capacity Professional discharges the protective authorisation, or
- (c) the Tribunal makes an order discharging the protective authorisation.

(2) For the avoidance of doubt, a protective authorisation does not automatically cease to have effect if P becomes subject to an order under the Mental Health Law.

Renewal of protective authorisation.

66. (1) A Capacity Professional may, on one or more occasions, renew a protective authorisation in accordance with this section for a specified period ("**the renewal period**") of up to 12 months.

(2) For the avoidance of doubt, a protective authorisation which has ceased to have effect cannot be renewed.

(3) A Capacity Professional may renew a protective authorisation if –

- (a) the Capacity Professional is satisfied –
 - (i) that the qualifying requirements continue to be met, and
 - (ii) that it is unlikely that there will be any significant change in P's condition during the renewal period which would affect whether those requirements are met, and
- (b) the Capacity Professional has carried out consultation under section 67.

Consultation.

67. (1) Consultation under this section must be carried out with –

- (a) the person subject to the protective authorisation ("**P**"),
- (b) P's Representative (including an attorney under a valid lasting power of attorney granted by P or a guardian appointed for P by a court), or any person named by P as someone to be consulted about arrangements of the kind in question, and
- (c) any person engaged in caring for P or interested in P's welfare.

(2) The main purpose of the consultation under this section is to try to ascertain P's wishes or feelings in relation to the arrangements.

(3) If it is not practicable or appropriate to consult a particular

person falling within subsection (1), the duty to consult that person does not apply.

NOTE

In accordance with the provisions of the Children (Consequential Amendments etc.) (Guernsey and Alderney) Ordinance, 2009, section 2, with effect from 4th January, 2010, and having regard to the reference in this section to "guardian", a guardian or person referred to as such has parental responsibility in respect of a child if the conditions in subsection (1) or subsection (2) of that section are satisfied.

Reassessment and challenge

Power and duty of Capacity Professional to reassess the qualifying requirements.

68. (1) Subject to subsection (2), a Capacity Professional may at any time complete, or arrange for the completion of, any reassessment required for the grant of a protective assessment.

(2) A Capacity Professional must complete, or arrange for the completion of, the relevant reassessments –

- (a) if a reasonable request is made by a person named in section 67(1),
- (b) if P becomes subject to an order under the Mental Health Law,
- (c) if subsection (3) applies, and
- (d) if (in any other case) a Capacity Professional becomes aware of a significant change in P's condition or circumstances.

- (3) This subsection applies where –
- (a) the arrangements provide for P to reside in, or to receive care or treatment at, a specified placement,
 - (b) the Capacity Professional becomes aware that P does not wish to reside in, or to receive care or treatment at, that placement.

Challenge to protective authorisation.

69. (1) The following persons may apply to the Tribunal to challenge a protective authorisation in relation to a person ("P") –

- (a) P,
- (b) P's Representative,
- (c) an ICR, or
- (d) where P is under 18, any person with parental responsibility.

(2) Any application to the Tribunal must be made in accordance with rules of court made under section 83.

Referral of protective authorisation.

70. (1) Without prejudice to any other power or duty to refer a matter to the Tribunal, and subject to subsection (2), a Capacity Professional may refer P's case to the Tribunal for consideration.

(2) A Capacity Professional may not make a referral under subsection (1) where an application has been made to the Tribunal under section 69 and –

- (a) it has not been withdrawn, or
- (b) no determination has been reached by the Tribunal in relation to the application.

(3) Any referral to the Tribunal must be made in accordance with rules of court made under section 83.

Representatives

Person's representative.

71. (1) Where a protective authorisation is granted in relation to a person ("**P**"), a Capacity Professional must appoint a representative for P ("**P's Representative**") as soon as reasonably practicable.

(2) A person may only be appointed as P's Representative if that person –

- (a) has attained the age of 18,
- (b) consents to carry out the functions set out in subsection (3), and
- (c) is, in the opinion of the Capacity Professional, an appropriate person to –
 - (i) carry out those functions, and

- (ii) otherwise represent P in relation to the protective authorisation.
- (3) The functions of P's Representative are to –
 - (a) maintain regular contact with P, whether by visiting in person or otherwise, and
 - (b) in relation to the protective authorisation –
 - (i) provide support to P so that P may participate as fully as possible in any relevant decision,
 - (ii) obtain and evaluate relevant information,
 - (iii) ascertain what P's wishes and feelings are, or would be likely to be if P had capacity, in relation to the relevant arrangements for P's care,
 - (iv) represent P's wishes and feelings in relation to any reassessment or challenge (including making any application), and
 - (v) do, or arrange to have done, any other reasonably practicable thing to support P.
- (4) P's Representative may take all steps necessary to carry out the functions set out in subsection (3), and in particular –

- (a) may interview P in private, and
- (b) may, at all reasonable times, examine and take copies of –
 - (i) any health record of P, and
 - (ii) any record of, or held by, an Island authority and compiled in connection with a social services function,

which the person holding the record considers may allow P's Representative to carry out the functions set out in subsection (3).

(5) For the avoidance of doubt, P's Representative has the same rights to challenge any decision as if the representative were any other person engaged in caring for P or interested in P's welfare.

(6) Where P's Representative is appointed under subsection (1), the Capacity Professional must take such steps as are reasonably practicable to help P and P's Representative understand –

- (a) the effect, purpose and duration of the protective authorisation,
- (b) any conditions to which the authorisation is subject,
- (c) the right to request a re-assessment of the qualifying requirements of the protective authorisation by a Capacity Professional,

- (d) the right to make an application to the relevant court or tribunal challenging the protective authorisation,
 - (e) any other right to make a complaint concerning the protective authorisation,
 - (f) how to exercise the rights set out in paragraphs (c) to (e), and
 - (g) the right to request the appointment of an ICR under Part 7.
- (7) Where P's Representative –
- (a) no longer wishes to carry out the functions set out in subsection (3), or
 - (b) is, in the Capacity Professional's opinion, unfit or otherwise unable to carry out those functions,

the Capacity Professional may appoint another person as P's Representative in the first person's place in accordance with this section.

- (8) The Committee may by regulation –
- (a) amend subsections (2) and (3),
 - (b) make such other provision as to the functions of representatives appointed under this section as it thinks fit.

General

Amendment of this Part.

72. (1) The States may by Ordinance amend this Part where it appears to the States to be necessary or expedient to do so for the purpose of –

- (a) protecting persons who fall within this Part from harm,
- (b) promoting the proper care of those persons,
- (c) facilitating the fair and efficient carrying out of the functions of Capacity Professionals, P's Representatives and ICRs, and
- (d) discharging any international obligation to which the Bailiwick, or any part thereof, is subject.

(2) An Ordinance made under this Law by the States applying in Sark ceases to have effect in Sark if, at the first or second meeting of the Chief Pleas of Sark following the approval date, the Chief Pleas resolve to disapprove its application to Sark.

(3) If the Chief Pleas of Sark resolves to disapprove the application of an Ordinance in accordance with subsection (2), the Ordinance ceases to have effect in Sark, but without prejudice to –

- (a) anything done under the Ordinance in Sark, or
- (b) the making of a new Ordinance having effect in Sark.

(4) Subsection (1) is without prejudice to any other provision of this Law conferring power to make Ordinances and vice versa.

PART 9
SAFEGUARDING

Safeguarding.

73. (1) The States may by Ordinance make such provision as they see fit in relation to safeguarding vulnerable persons aged 18 or over ("**vulnerable persons**").

(2) The Chief Pleas of Sark may by Ordinance make such provision as they see fit in relation to safeguarding vulnerable persons.

(2) Without limiting the power set out in subsection (1) or (2), an Ordinance under that subsection may, in particular, make provision in relation to –

- (a) the grounds for, and conduct of, safeguarding enquiries,
- (b) the establishment of any body to help and protect vulnerable persons in the Bailiwick or any part thereof,
- (c) the grounds for, and conduct of, safeguarding vulnerable persons reviews,
- (e) the disclosure, and sharing, of information for the purposes of safeguarding vulnerable persons, and
- (f) rights of entry and rights to require information or the production of documents from any person in relation to any safeguarding enquiry or safeguarding vulnerable

persons review,

- (g) the creation and punishment of offences for contravention of any rights set out in paragraph (f).

PART 10 GENERAL PROVISIONS

Research

Research: power to make Ordinances.

74. The States may by Ordinance make such provision as they think fit in relation to research involving persons who lack capacity.

Criminal provisions

Ill-treatment or neglect.

75. (1) A person ("D") –
- (a) who ill-treats or wilfully neglects a person ("P") who lacks, or whom D reasonably believes to lack, capacity to consent to the acts which constitute the ill-treatment or wilful neglect, and
 - (b) who –
 - (i) has the care of P,
 - (ii) is an attorney under a lasting power of attorney created by P, or

(iii) is a guardian appointed by the court for P,

is guilty of an offence.

(2) A person guilty of an offence under this section is liable –

- (a) on summary conviction, to imprisonment for a term not exceeding 2 years or a fine not exceeding level 5 on the uniform scale, or both,
- (b) on conviction on indictment, to imprisonment for a term not exceeding 5 years or a fine, or both.

NOTE

In accordance with the provisions of the Children (Consequential Amendments etc.) (Guernsey and Alderney) Ordinance, 2009, section 2, with effect from 4th January, 2010, and having regard to the reference in this section to "guardian", a guardian or person referred to as such has parental responsibility in respect of a child if the conditions in subsection (1) or subsection (2) of that section are satisfied.

Effect on criminal law.

76. For the avoidance of doubt, it is hereby declared that nothing in this Law is to be taken to affect the law relating to murder or manslaughter, or the operation of section 5 of the Homicide and Suicide (Bailiwick of Guernsey) Law, 2006¹ (criminal liability for complicity in another's suicide).

General

Disclosure.

¹ Order in Council No. XX of 2009.

77. (1) A person ("A") may disclose any information or document to another person ("B") for the purposes of –

- (a) carrying out a function under, or making a decision in accordance with, this Law, or
- (b) permitting B to carry out any preparatory steps related to carrying out such a function or making such a decision,

where it is the best interests of the person for whom the function is being carried out or in respect of whom the decision is being made (as the case may be) for the disclosure to take place.

(2) Except as provided by subsection (3), the supply of information under this section is to be taken not to breach any restriction on the disclosure of information (however arising or imposed).

(3) This section does not authorise the doing of anything that contravenes the Data Protection (Bailiwick of Guernsey) Law, 2017.

(4) This section does not affect a power to supply information that exists apart from this section.

Power to carry Law into effect by Ordinance.

78. (1) The States may by Ordinance make such other provision as they think fit for the purposes of carrying this Law into effect in Guernsey and Alderney.

(2) The Chief Pleas may by Ordinance make such additional provision as they think fit for the purposes of carrying this Law into effect in Sark.

NOTE

The following Ordinance has been made under section 78:

*Capacity (Lasting Powers of Attorney) (Bailiwick of Guernsey)
Ordinance, 2022.*

Savings and transitional provisions, etc.

79. (1) The States by Ordinance may make such provision as they see fit in relation to savings and transitional provisions, including the making of consequential amendments and repeals.

(2) Without limiting the power under subsection (1), an Ordinance made under this section may amend the Mental Health (Bailiwick of Guernsey) Law, 2010 or any enactment made under that Law in order to make any amendments necessary for the purpose of this Law in relation to the Mental Health and Capacity Review Tribunal.

(3) This section is without prejudice to section 20 of the Interpretation and Standard Provisions (Bailiwick of Guernsey) Law, 2016^m.

NOTE

The following Ordinance has been made under section 79:

*Capacity (Lasting Powers of Attorney) (Bailiwick of Guernsey)
Ordinance, 2022.*

Code of practice.

80. (1) The Committee shall prepare and issue a code of practice (a

^m No. V of 2018; as amended by Ordinance Nos. XXII and XXVI of 2018.

"code") –

- (a) for the guidance of persons assessing whether a person has capacity in relation to any matter,
- (b) for the guidance of persons acting in connection with the care or treatment of another person,
- (c) for the guidance of attorneys under lasting powers of attorney,
- (d) with respect to advance decisions and advance care plans,
- (e) for the guidance of persons acting in connection with protective authorisations, and
- (f) with respect to such other matters concerned with this Law as it thinks fit.

(2) The Committee may from time to time revise a code.

(3) It is the duty of a person to have regard to any relevant code when acting in relation to a person who lacks capacity and is doing so in one or more of the following ways –

- (a) as the attorney under a lasting power of attorney,
- (b) as a person acting in relation to a protective authorisation,

(c) in a professional capacity, or

(d) for remuneration.

(4) If it appears to a court or tribunal conducting any criminal or civil proceedings that –

(a) a provision of a code, or

(b) a failure to comply with a code,

is relevant to a question arising in the proceedings, the provision or failure must be taken into account in deciding the question.

(5) Before preparing or revising a code, the Committee must consult such persons as it considers appropriate, including but not limited to –

(a) the Policy and Finance Committee of the States of Alderney, and

(b) the Policy and Finance Committee of the Chief Pleas.

(6) The Committee must arrange for any code that it has issued to be published in such a way as it considers appropriate for bringing the code to the attention of persons likely to be concerned with its provisions.

Laying of regulations.

81. Regulations under this Law shall be laid before a meeting of the States as soon as possible after being made; and, if at that or the next meeting the States resolve that the regulations be annulled, then they shall cease to have effect, but without prejudice to anything done under them or to the making of new regulations.

Special provisions governing application of regulations and codes of practice to Sark.

82. Regulations made, and any code of practice issued, by the Committee shall not have effect in respect of Sark until, and unless, they have been approved by resolution of the Medical & Emergency Services Committee of the Chief Pleas.

Rules of court.

83. (1) Subject to subsection (3), a court may by order make rules dealing with all procedural and incidental matters arising under this Law, and generally for carrying this Law into effect.

- (2) Rules under subsection (1) may, without limitation be made –
 - (a) in respect of the practice and procedure to be followed in connection with proceedings before the court under this Law, and
 - (b) without prejudice to the generality of paragraph (a), generally in respect of –
 - (i) applications under this Law (including the hearing and determination of applications otherwise than in open court),
 - (ii) practice and procedure under this Law before the court, and
 - (iii) in the case of the Royal Court, practice and procedure under this Law before the Tribunal,

- (c) in respect of evidence including, without limitation, rules as to the admission of evidence and evidential presumptions,
- (d) for the visiting and interviewing of persons in private by or under the directions of the court, and
- (e) in respect of the joinder of such persons as parties.

(3) Rules made under subsection (1) by the Court of Alderney or the Court of the Seneschal shall, without prejudice to the validity of anything done under them, or to the making of new rules, cease to have effect –

- (a) if they are disapproved by the Royal Court, immediately upon such disapproval, or
- (b) if they are not approved by the Royal Court within 3 months after being made, at the expiration of those 3 months.

(4) Subsection (1) is without prejudice to any other power to make rules.

(5) Unless the context requires otherwise, for the purposes of this section, "**court**" means –

- (a) in respect of Alderney, the Court of Alderney,
- (b) in respect of Sark, the Court of the Seneschal, and
- (c) in respect of Guernsey, the Royal Court (and for the

purposes of this section, "**the Royal Court**" means the Royal Court sitting as a Full Court).

Miscellaneous

Citation.

84. This Law may be cited as the Capacity (Bailiwick of Guernsey) Law, 2020.

Commencement.

85. (1) This Law shall come into force –

- (a) in respect of Guernsey and Alderney, on the day appointed by Ordinance of the States, and
- (b) in respect of Sark, on the day appointed by Ordinance of Chief Pleas.

(2) An Ordinance made under subsection (1) may appoint different dates for different provisions and for different purposes.

NOTES

The following provisions of the Law were brought into force on 1st April, 2022 in respect of, first, the Islands of Guernsey and Alderney by the Capacity (Bailiwick of Guernsey) Law, 2020 (Commencement) (Guernsey and Alderney) Ordinance, 2022, section 1 and, second, the Island of Sark by the Capacity (Bailiwick of Guernsey) Law, 2020 (Commencement) (Sark) Ordinance, 2022, section 1:

- (a) *Parts 1 and 2, Part 3 (except sections 17 to 20) and section 77, but only to the extent those provisions are relevant for the bringing into force, and operation, of Part 4;*
- (b) *sections 78 to 85; and*

(c) *Part 4.*

The following Ordinances have been made under section 85:

Capacity (Bailiwick of Guernsey) Law, 2020 (Commencement)
(Guernsey and Alderney) Ordinance, 2022;
Capacity (Bailiwick of Guernsey) Law, 2020 (Commencement)
(Sark) Ordinance, 2022.
