

Guernsey Disability Alliance

Equality • Dignity • Inclusion

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Dear Deputy Brouard

Capacity Law: Lasting Powers of Attorney - Draft Ordinance

Thank you for your letter dated 5th August 2021 and for permitting an extension to the consultation period for the GDA to submit its response to the draft ordinance on the Lasting Powers of Attorney (LPA).

Unfortunately due to leave in August we were unable to meet with our interested member organisations until later in September. I would ask that the timing of consultations around holiday periods is kindly considered for any future consultations.

Publicity

We are very pleased that the introduction of the Capacity Law is moving ahead and that the LPA Ordinance has been drafted ready for commencement of the Law.

However, it was felt for the LPA to make a significant impact that ongoing publicity will be required so that everyone can have an opportunity to make an LPA that wants to. Obviously once a person no longer has capacity an LPA cannot be made.

I hope that advocates would also encourage people to consider an LPA when making wills, buying and selling property etc. HSC can also ensure that there is widespread publicity that is available encouraging the take up of LPAs.

Safeguarding

Without sight of the supporting procedures and Code of Practice etc it is difficult to understand how Her Majesty's Greffier might consider someone's fitness to make an LPA.

Under the new Capacity Law the presumption would be that the grantor of the LPA had capacity to execute the relevant instrument, and register the relevant instrument. It is not clear whether this could be undertaken by post without attending the Greffe or could be registered by someone, other than the grantor, bringing the document to the Greffe?

If it can only be in person by the grantor would identification be required? If so what provision could be made for those who might not hold a driving license or passport?

Not everyone might be physically able to attend the Greffe, eg they may be in hospital etc. Would there be an ability for someone from the Greffe to visit the grantor if they were unable to attend the office?

If someone other than the grantor were able to register the LPA what safeguards would be put in place to ensure that the grantor wanted it registered?

In the UK, I understand there is provision for the attorney, named in the LPA, to be able to register the LPA as well as the grantor. This can lead to LPAs being registered where the grantor has lost capacity, between the LPA being executed and the LPA being registered. It appears from the current draft that this would not be the case in Guernsey, but it is not clear if this would be possible from the procedure e.g. the attorney sending the LPA to be registered by post?

Concern was also raised by our members around the activation of the LPA. It is not clear from the Ordinance what evidence will need to be provided by the attorney to activate the LPA. This will no doubt be contained in the relevant regulations. It is presumed that the prescribed person completing the prescribed certificate will be a medical practitioner registered to practice in the Bailiwick or at least Guernsey. Was anyone else envisaged to be able to be able to provide this certificate? We would be concerned if non medically qualified persons were able to certify that they grantor had lost capacity and on what basis this would be judged.

We would be concerned over any coercion or control on the grantor in making and registering an LPA. In activating any LPA there may also be dispute from the grantor if they do not feel they have lost capacity. If this were the case would it then be up to Her Majesty's Greffier to make the final decision or the Committee?

It is not clear from the Ordinance what would trigger Her Majesty's Greffier to decide to make a request to the Committee to undertake an investigation, nor the timeframe of that investigation which may need to be expedient to reduce any damage caused. It would appear the Committee have the power to suspend the attorney pending an investigation, but would the attorney have a right of appeal?

Costs and Legal Aid

It would appear that if the forms for executing a LPA are simple there is no need for the grantor to seek legal advice if they are clear about their own wishes. Some people may prefer to seek the advice of an advocate or may need to seek legal advice if they believe the attorney or someone else is not acting in their best interests regarding the LPA. Would Legal Aid be available in any circumstances in executing, registering or activating a LPA? It is understood that there is Legal Aid available for guardianships and it would appear inconsistent not to allow Legal Aid for LPA.

It would be helpful to make clear any costs that might be associated with any element of the LPA including legal fees, court fees and doctors' fees. If alternative help is available from the Greffe or Citizens Advice Bureau to complete the LPAs this should also be publicised.

Fluctuating Capacity

The new Capacity Law should enable people with fluctuating capacity to execute and register an LPA but this may require guidance to take into account that the persons capacity might be challenged. What policies and procedures will be put in place to ensure that a person's wishes, made when they have capacity, are undertaken.

Thank you for letting us have the opportunity to comment on the draft Ordinance. Much of the information answering the questions raised will no doubt be in the detail of the policies and procedures. I hope that clear information will be provided including in easy read form and that there is continued publicity to encourage everyone with capacity, that would like to, to make a LPA.

Typo

"Revocation, etc." is section 28 in my version and should be section 7. I have not checked for typos but it might be worth checking the rest of the numbering.

In considering our response we have met with member organisations including representatives from the Guernsey Alzheimer's Association and the Alzheimers Society Guernsey. Any member organisation may also send its own response to the consultation.

This is a long overdue provision which we hope will help many people to have their long term wishes taken into account. We are grateful that the Committee is bringing this draft forward.

Yours sincerely,

Carol Le Page
Director Social Policy
Guernsey Disability Alliance